

The institutional functioning of the EU, 2012-2013

Citation for published version (APA):

van der Mei, A. P., & Vos, E. I. L. (Eds.) (2013). *The institutional functioning of the EU, 2012-2013*. Maastricht University, Maastricht Centre for European Law. Faculty of Law. EU Law Foundations No. Volume III

Document status and date:

Published: 01/01/2013

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

EU Law Foundations



The Institutional Functioning of the EU

2012-2013 Volume III

Maastricht Centre for European Law
Faculty of Law
Maastricht University

EU LAW FOUNDATIONS

The Institutional Functioning of the EU

Volume III 2012-2013

**Maastricht Centre for European Law
Faculty of Law
Maastricht University**

Table of Contents

Acknowledgments	3
Special Contribution	5
Reflections on the impact of the Treaty of Maastricht on Maastricht <i>Onno Hoes</i>	
The Heritage of the Luxembourg Accords Post-Lisbon <i>Felix Bahmann</i>	9
Decision-making by Consensus: By Definition a Bad Thing? <i>Johanna Hagenauer</i>	17
Consensus Decision: An EU Asset? <i>Berit Gleixner</i>	27
The Court of Justice of the European Union and the European Court of Human Rights: Allies or Enemies? <i>Charlotte Mol</i>	35
The Relationship between the Court of Justice of the European Union and the European Court of Human Rights - Complications of the accession of the EU to the ECHR <i>Rebecca Wörner</i>	43
The EU Charter of Fundamental Rights and the Principle of Supremacy <i>Lea Main-Klingst</i>	51
The Independence of the Hungarian Judiciary: An EU Problem? <i>Sinead Haywood</i>	61
The Preliminary Ruling Procedure: Does Köbler undermine CILFIT? <i>Caroline Calomme</i>	71
The Preliminary Ruling Procedure: Köbler versus CILFIT? <i>Frederick Harker-Mortlock</i>	81
Linguistic diversity in the EU - Is a Policy Choice that Supports 23 Official Languages the EU still Defendable in a Union of 27 and Maybe even more? <i>Ralf Manz</i>	87
Linguistic Diversity at What Cost: Article 55TEU in Need of Revision? <i>Loyce Mrewa</i>	97
Introducing Dissenting and Concurring Opinions at the Court of Justice: Improving the Readability of Judgments or Creating Mayhem? <i>Egelyn Braun</i>	107

Acknowledgements

This book contains selected papers written by students who followed the course “EU Law Foundations – The Institutional Functioning of the European Union”, which is part of the Bachelor Programme European Law School offered by the Faculty of Law of the Maastricht University, in 2012-2013.

In 2010 the Education, Audiovisual and Culture Executive Agency (EACEA) awarded financial support to this course in the form of a Jean Monnet European Module (Lifelong Learning Programme). The Jean Monnet grant enabled us first of all to invite a series of distinguished guest-speakers, who shared their knowledge, experiences and views on the institutional functioning of the European Union with the students. The guest-speakers included *Onno Hoes* (Mayor, City Maastricht), *Bruno de Witte* (Professor Maastricht University and Robert Schumann Centre, European University Institute Florence), *Robert Madelin* (Director General of DG Connect European Commission) and *Jean Paul Jacqué* (Honorary Director General, Council of the European Union and Emeritus Professor, University of Strasbourg). We thank the guest-speakers for their inspiring presentations, which have enriched both the students and the teaching staff. Special thanks go to Mayor Onno Hoes, who permitted us to include his lecture in this volume.

In addition, the Jean Monnet grant enabled us *inter alia* to organize each year a Student Conference. In December 2010 and December 2011 respectively we organized the first two conferences. The best papers presented by students during these conferences were published in *EU Law Foundations – The Institutional Functioning of the European Union – 2010-2011 Volume I* and *EU Law Foundations – The Institutional Functioning of the European Union – 2011-2012 Volume II* respectively. These volumes are available in hardcopy as well in its soft copy version on the website of the Maastricht Centre for European Law (MCEL).¹

The third conference was held on 7 December 2012. Each of the 180 students participating in the course was given the opportunity to either present a paper or act as a discussant of other students' papers in workshops composed of 40-45 participants. The quality of the presentations and discussions, in which also staff members of our Faculty participated, was high and led to often lively and heated debates on issues involving the institutional functioning of the European Union. The 12 best papers are collected in this special volume. The Conference was closed by a keynote address delivered by *Sacha Prechal*, Judge at the Court of Justice of the European Union and Professor of European Law, University of Utrecht, entitled “Being a Judge in Europe – What Makes the Difference?”. We are grateful for her thought-provoking presentation and sharing her experiences with us.

In addition to Judge Prechal and the other guest-speakers, we are indebted to Monica Claes, Florin Coman-Kund, Tanja Ehnert, Giulia Giardi, Suzanne Jongste, Sead Kadic, Raymond Luja, Elise Muir, Andrea Ott, L. Tilindyte, Maartje de Visser and Sabrina Wirtz for their various contributions. Last but not least, we would like to express our sincere gratitude to EACEA for the financial support received without which it would have been impossible to make the course as interesting and successful as it was.

Anne Pieter van der Mei and Ellen Vos

¹ <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForEuropeanLaw.htm>.

REFLECTIONS ON THE IMPACT OF THE TREATY OF MAASTRICHT ON MAASTRICHT

Onno Hoes

Dear Students and Staff of the Maastricht Centre for European Law, Ladies and Gentlemen,

It is with great pleasure that I have accepted the kind invitation of Professor Ellen Vos to tell something of my experiences with Europe in your course in EU Law Foundations. I am pleased to do so not only because Europe and its recent history are very important for Maastricht, but also because it gives me the opportunity to address you as members of our municipal society.

As Mayor of this city, I am convinced that Maastricht would not be what it is today, if you, students, weren't here and would not have brought your dynamics into our community. Maastricht needs its students, and hopefully you need Maastricht, and all the things you can learn and experience here, too. You are the future, you should have the new ideas and initiatives, be it politically, be it economically, be it cultural.

If you ask me if there was any impact of the Treaty of Maastricht on Maastricht itself, my first answer would be: it gave us an enormous amount of worldwide free publicity. The name 'Maastricht' has been mentioned during the last 20 years in countless articles, news reports and so on. And until today journalists from all over the world visit the town if they want to make a report from somewhere in Europe, for example on the economic crisis and its impact on people on the street. This year alone, the city was visited among others by the BBC, the Wall Street Journal, the Economist, the national television of Japan, Sweden, Poland and Belarus, MTV Moscow and writing journalists from all over Europe.

I would like to emphasize that it made us not only aware of the fact that Maastricht, the birthplace of the European Union and the Euro, lies in the middle of the new Europe. It also made us aware of the fact Europe lies in Maastricht, more than anywhere else, as you yourselves demonstrate by having different nationalities and having chosen a study that concerns itself with the legal foundations of our international, European society. International contacts and exchange of knowledge are becoming more and more normal and essential. Indeed it would be impossible to live without those contacts.

Ladies and gentlemen, exactly 20 years ago the European Union and its currency, the euro, were established by the Maastricht Treaty, adopted here on February 7th, 1992. In February 2012 we celebrated the 20th anniversary of the 1992 Treaty in a time of crisis and doubts. Public discussions arose on the question of whether it was perhaps a mistake to have accepted the monetary union, the political union and whether there should perhaps have been stronger conditions for accession. However, during the conference in February 2012, that was organized by the University in cooperation with the city, people who were directly involved in the negotiations that lead to the Treaty concluded that it was a logical outcome of the spirit of that time in a Europe that aimed at a permanent unification. Not only to create a stable political climate, with respect though for national singularities and differences, but also to prevent future military conflicts within Europe.

I also would like to remind you that in the late eighties and early nineties Western Europe was confronted with the end of communism and the cold war. The new political map of Eastern Europe asked for an answer of the existing European Community. Despite the current crisis, the outcome of the February 2012 conference reflected optimism about the future of Europe and the role of Europe in the future world. Let us not forget that, being the largest economic conglomerate in the world, the European Union can take a much stronger position in the world, both economic and political, than any separate nation can do.

Another aspect of the Treaty is less known by the general public, but had an impact on our society in general, and maybe on the Maastricht University and its Faculty of Law in particular. European democracy and parliamentarism, and therefore European Union law, got a stronger position. The Maastricht Treaty created the co-decision procedure, a reform that boosted the role of the European Parliament in the European Union.

When signing the Treaty of Maastricht, European leaders adopted declarations stressing how important it is to involve parliaments in European decision-making, both the European Parliament and the national parliaments. Since then the role of parliaments in European decision-making has grown considerably. I believe we should be proud of this development because strong parliaments promote responsible European governance and enhance democracy in Europe.

So one of the impacts of the Treaty on Maastricht is that the city is host to strong university research centres which focus on European law, democratic accountability and parliamentary control: your own Maastricht Centre on European Law and the Montesquieu Institute Maastricht. And of course I should mention the departments of History and of Political Science of the Faculty of Arts and Social Sciences (FASOS), which specialise in the history of European integration and in European institutional politics.

If you permit me to take a look at the future, I believe that Maastricht agrees for an important part with the view developed by our key-note speaker in February 2012, dr. Parag Khanna, who argued that a mixture of the public and private sector will be needed to save the world. Not only nations and governmental organisations, but also large cities, multinational companies, non-governmental organisations and even extremely rich entrepreneurs will play their role in providing the world with what it needs. He also emphasized that, from a political point of view, strong regional partnerships are essential and he believed that the European Union is such a strong regional player in the world and has the resilience to cope with the problems of today.

Europe in the next twenty years, ladies and gentlemen, is something that will have to be invented, organised and supported also and maybe just by you, being born around the time the Treaty was prepared and signed. The next 20 years it is you, who will be the real ambassadors of the Maastricht and the European soul. A soul that is nourished by the fact that you have to be the instigators of the future, that you may have the new ideas Europe needs. And hopefully, those ideas will benefit from the thoughts that you will receive during your studies here.

Looking back, again I must add that, apart from the indirect benefits of the free publicity, this world-famous treaty has really proven to be a huge advantage for our city. Since then, we have been referred to as the Fourth City of Europe, after Brussels, Strasbourg and Luxembourg. Not in terms of size, of course, but rather in reference to our European profile. Moreover, the Treaty nourishes the international character of Maastricht, which you encounter here in the Maastricht University every day, and also enhanced by a lot of institutes in Maastricht, attracting young people from all over Europe and the rest of the world to come live and study here. The Maastricht University, the Zuyd University of Applied Sciences, the

European Institute for Public Administration, the European Journalism Centre, the Maastricht School of Management, the United Nations University and the European Centre for Development Policy Management are some of the exponents of those international orientated educational institutes.

Ladies and gentlemen, it is also good to realise that it is not only the Maastricht Treaty that we have to thank for our international position. Our European status is largely due to our geographical location. After all, the Maastricht region shares 220 kilometres of border with Belgium and Germany, and only eight kilometres with the rest of the Netherlands. You will understand and already have experienced yourselves, that people, goods and services are constantly crossing the borders here. Indeed, in this region we are more or less forced to think and act as genuine Europeans. That is why the municipal government's policy and all the organisations and businesses operating in our city are European in outlook.

Nevertheless, I would like to emphasize the importance of a United Europe, as we in Maastricht see it. Having been a trading city – and after the industrialisation – a fabricating city for most of our history, Maastricht recognises the necessity of sharing responsibilities for economic interests, legal and moral values, and the democratic justification of it all. I strongly believe that a united Europe is essential for our prosperity, and that the internal market adds to existing opportunities of economic growth. The Netherlands and Maastricht were for centuries internationally orientated, we created and still create a lot of that prosperity in foreign countries and especially in Europe.

Back to the Treaty, ladies and gentlemen. Today we face a new challenge. The Maastricht Treaty of 1992 was the first European treaty with a cultural paragraph. In many ways borders still are a huge obstacle for cooperation, for business, for knowledge institutes and for cultural productions and products. In 2018 the Netherlands, together with Malta, is entitled to deliver the European Capital of Culture. As you may have noticed, Maastricht candidates for this title, not in the least because in 2018 the Treaty will be 25 years in effect. Especially in this part of Europe we share with our neighbors of the Euregion Maas-Rhein a rich history and cultural heritage, which should make it possible to live, to learn, to work and to enjoy with each other. It is the whole region which supports Maastricht in its nomination: the cities of Aachen, Liège, Hasselt, Tongeren, Genk, Sint-Truiden, Heerlen, Geleen-Sittard, the Dutch province of Limburg, the Belgian provinces of Limburg and Liège, the Deutschsprachige Gemeinschaft Belgiens, and the region Aachen.

Maastricht lies on one of the ethnic fault lines of Europe. Today those fault lines do not compare to the intensity of the fault lines of religion and race of which our society nowadays is so aware of. But for the people who lived in this region in the past, their divisions were very real. Some of the divisions were linguistic ones. Limburg's is the local dialect and Dutch is the official language but it is also on the dividing line between Dutch, German and French. Maastricht is now part of a multilingual Euro-region. It has prospered and I am certain it will continue to do so for years to come. Inspired by the Treaty, Maastricht has accepted difference and embraced it.

The Treaty of 1992 made the name Maastricht almost synonymous for the European Union. As European Capital of Culture our Euregion could be a new example for the rest of Europe and other Euregions. An example, ladies and gentlemen, of a new Europe, the Europe of the civilians, built bottom-up on the foundation of culture. Our bid, called *Europa Herontdekt* or in English *Europe Revisited*, was officially presented only ten days ago. It describes four major program lines: *Speaking in tongues*, *Remembering the future*, *Mirroring Europe* and *Living Europe*.

You all have a keen interest in Europe and its legal and cultural foundations, and you will be asked to bring in your own ideas, opinions and perspectives into the content of a new treaty. As I said before: you are the young generation which could and should play a key role in the future course of Europe. Together with everyone else who was born around the time of the original Treaty you are *the generation Maastricht*.

Ladies and gentlemen, I would like to thank you for choosing this university as a worthy place to study and I wish you the best of luck during your future years, here in our common European city of Maastricht. Thank you for your attention.

THE HERITAGE OF THE LUXEMBOURG ACCORDS POST-LISBON

Felix Bahmann

1. *Introduction*

In my paper I will address the Luxembourg Compromise of 1966 and research its repercussions throughout the process of European Integration until today. The arrangement agreed upon in January 1966 has sparked an on-going discussion – not only about its causes and effects, but also on its actual legal nature. I would therefore like to follow the development of Qualified Majority Voting in the Council and evaluate, in how far the Luxembourg Compromise still influences the current institutional framework.

To that end, I will start with a short exposition of the main historic events and developments, namely the Empty Chair Crisis of 1965 and the Compromise in the following year but also the further developments in the Single European Act in 1986, the Treaty of Maastricht of 1992 and the subsequent Ioannina Compromise in 1994.

After that, I will address these questions from a theoretical perspective and try to explain them in line with the supranational and neofunctionalist views on European integration. In how far was the Luxembourg Compromise a throwback to the supranational agenda? Could it together with the Ioannina Compromise support the intergovernmentalist's view on the European Union?

Eventually I will try to combine these two parts, the historical facts and the theoretical background to analyze whether and to which degree the Luxembourg Compromise is still active today. Based on this I will present my conclusion: The Luxembourg Compromise and its successors are very alive today and define the institutional framework of the European Union at its core.

2. *The Empty Chair Crisis and the Luxembourg Compromise*

The European Integration has been in its beginning a multi-layered process. The Council of Europe of 1949 was supplemented by the European Atomic Energy Community and first and foremost the European Economic Community, established in the Treaty of Rome in 1957.¹

In retrospective, the first years of the EEC seem like a honeymoon, characterized by the settling into the new premises in Brussels, the delegation of tasks and a general atmosphere of harmonious cooperation.² The six founding Member States – France, Italy, Western Germany, the Netherlands, Belgium and Luxembourg – worked together and set time frames for further integration. Special emphasis was put on the setting up of the Customs Union.³

Even though different opinions on the future character of the EEC existed from the start, these did not become apparent for a longer time. Whereas de Gaulle, the charismatic President of France saw the EEC mainly as platform for cooperation while fully retaining national sovereignty based on the principle of direct diplomacy between the Member States⁴, the Benelux countries were open for a more supranational approach. Also the newly instituted

¹ De Witte 2009, p. 9.

² Dinan 2010, p. 34.

³ Ibid.

⁴ Eggermont 2012, p. 7.

Commission of the European Economic Community under its first president Walter Hallstein was in favor of central competences.⁵

Of special importance for France was the Common Agricultural Policy, with which it wanted to externalize the cost of subsidizing its “large and unproductive agricultural sector”⁶ to the European level. The Commission wanted to seize this opportunity and pushed for the establishment of a system of own financial resources, which would be brought up by the Member States, but exclusively administered by the EEC and that would replace the current temporary funding arrangement, which kept the decision power with the Member States. Furthermore, it asserted Art. 47 TEEC, which would make decisions on this matter subject to Qualified Majority Voting in the Council from 1966 on.⁷

Contrary to the original agreement in 1957 this change met the fierce resistance of de Gaulle, who after the French constitutional reform and the birth of the Fifth Republic adhered again to the ideal of a strong and independent France. Losing its blocking veto under Qualified Majority Voting system and the risk of being overruled, could not be reconciled with his aims.⁸

The French position was known and yet the Commission continued its plan, thereby “violating the golden rule of not taking any action likely to encounter an outright veto”, as Robert Marjolin put it.⁹ The conflict between France and the Commission escalated in June 1965 when de Gaulle declared that France would openly oppose Art. 47 TEEC and the Qualified Majority Voting system and recalled his ministers and permanent representatives from the Brussels institutions, leaving their chairs empty. However, since all other Member States stood together in this matter and de Gaulle won the elections in December 1965 only with a small margin, he gave up his hard line soon and was willing to negotiate an agreement.¹⁰ It was finally reached at a meeting in Luxembourg in January 1966, which still was largely an ‘Agreement to disagree’¹¹:

I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.

II. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.

IV. The six delegations nevertheless consider that this divergence does not prevent the Community’s work being resumed in accordance with the normal procedure.

Considering the Community law was still at an early stage at that time, the legal nature of the Luxembourg Compromise has always been uncertain and subject to intensive debate.¹² In

⁵ Dinan 2010, p. 37.

⁶ Dinan 2010, p. 36.

⁷ Dinan 2010, p. 37.

⁸ Eggermont 2012, p. 11.

⁹ Dinan 2010, p. 37.

¹⁰ Dinan 2010, p. 38.

¹¹ de Witte 2009, p. 39.

¹² Palavret 2006, p. 305.

short it made clear that, even though Art. 47 TEEC and the Qualified Majority Voting in some fields was left in place, each Member State could invoke its “very important interests” to veto any decisions which were to be taken by the council. As the second paragraph of the compromise points out, France deemed this as a definite and binding possibility, whereas the other Member States only agreed to “reach solutions which can be adopted by all the Members of the Council within a reasonable time.”

Notwithstanding these different views it soon became evident that the *de facto* rejection of Qualified Majority Voting paralyzed the Council and slowed down the processes within the EU, since the Member States could only bring forward proposals which were very likely to be adopted by all states.¹³

The Luxembourg Compromise did not take the form of an officially binding decision, so that the actual legal effect of it is disputable. Nevertheless, unanimity could henceforth always be reached. Some believe therefore that the Compromise reaffirmed Marjolin’s ‘golden rule’.¹⁴ According to the ‘orthodox’ interpretation, the Luxembourg Compromise came to an end with the Single European Act in 1986, which intended to break up the time of eurosclerosis and accelerate the integration process, eventually introducing Qualified Majority Voting in the Council.¹⁵ Others think, it was even till a later stage theoretically part of the Union *acquis*, yet not binding or enforceable, but generally observed.¹⁶

The Maastricht Treaty of 1992 further improved the application of Qualified Majority Voting in the European institutions. According to Art. 203, the Council of the European Union will use Qualified Majority Voting in certain fields.¹⁷ It furthermore introduced a system of weighted votes, roughly resembling the Member State’s population: The United Kingdom, Italy, France and Germany were assigned ten votes; Spain had eight; Belgium, the Netherlands, Greece and Portugal five; Sweden and Austria four; Ireland, Denmark and Ireland three and Luxembourg two votes. Before the first accession round, a Qualified Majority consisted of 54 out of 76 votes in total.¹⁸

After the accession of Finland, Austria and Sweden the total votes grew to 87, changing the Qualified Majority to 61. However, this also meant that the blocking minority was raised to 26 votes which met resistance from the United Kingdom and Spain, with especially the United Kingdom being driven by its Euroscepticism of that time. The British interests in the Council of the European Union are comparable to the French behavior in the European Council in 1965. Even though, these two are two different legal entities (and the latter is *de jure* not an organ of the European Union), both closely related, not only in terms of their composition, but also in their function and procedure.¹⁹

During a extraordinary meeting in Ioannina, the foreign ministers of the Member States therefore agreed on a special arrangement: The official blocking minority remained 26 votes, but 23 votes are sufficient to force the Council to reach a compromise within reasonable time.²⁰

This arrangement was sometimes seen as a comeback of the Luxembourg Compromise and an adaption to the new realities of the EU of twelve member states and later inspired the

¹³ Golub 2007, p. 179.

¹⁴ Eggermont 2012, p.8.

¹⁵ Dinan 2010, p. 262.

¹⁶ Westlake/Galloway 2004, p. 235.

¹⁷ Kent 2001, p. 23.

¹⁸ Dinan 2010, p. 166.

¹⁹ Dinan 2010, p. 237.

²⁰ Dinan 2010, p. 167.

respective provisions in the Treaties of Nice and Lisbon.²¹ It also brought to light, how institutional politics could be more complicated with a growing number of Member States.²²

Facing the forthcoming accession round in 2004, the Treaty of Nice again dealt with amending and updating the voting system in the Council.²³ For that purpose two main points were decided. Article 3 of the treaty set out a new definition of the Qualified Majority and Declarations 20 and 21 in the annex of the treaty explained the Member State's positions on the weighting of votes in the EU of 24.²⁴

Probably the most striking innovation was the combination of votes in the council with the population it represents. This so-called demographic clause, added to Art. 205 of the EC Treaty, ensured that for a decision to be adopted not only the qualified majority had to be reached, but the Member States voting in favor of a proposal also had to comprise 62% of the EU's overall population. This was further specified in the Accession Treaty of 2003, confirming Declaration 21 of the Treaty of Nice: France, the United Kingdom, Germany and Italy were given 29 votes, Spain and Poland 27. The other Member States had fewer votes, vaguely corresponding to their population.²⁵ This was also due to Poland's energetic struggle for a high number of votes, despite their population of only 38 million. Also, France vetoed Germany's strive for more votes and insisted on the symbolic parity between these two states.²⁶

Effectively, a council decision is adopted by a Qualified Majority, which needs to receive at least 232 out of the 321 total votes, which is 72.3 %, and fulfills the 'demography clause' of representing at least 62% of the EU's population.²⁷

3. *Neofunctionalism and Intergovernmentalism*

The theory of Neofunctionalism is closely connected to the work of Ernst Haas. In 1958 he published his book *The Uniting of Europe* which tried to explain the supranational cooperation in Western Europe after the Treaty of Rome. Although his theory is nowadays seen as centered on the European Integration process, it originally intended to formulate a 'grand theory', to make out patterns for future regional cooperation in all places of the world.²⁸

In short, the theory is based on the assumption that political integration follows from economic integration and tried to explain the transformation of the EU's organs and its power gains since the 1960ies.²⁹ Of special importance is the *Spillover* concept which lies at the core of Neofunctionalism. Haas believed that cooperating in a certain policy field would necessarily lead to the need of cooperation in other fields as well, leading to an automatic process of step-by-step integration. He mainly focused on researching the reasons of patterns of integration rather than formulation aims and end goals of this process.³⁰ He furthermore stated that even though national governments would not be the driving factors in this process,

²¹ Westlake/Galloway 2004, p. 245.

²² Dinan 2010, p. 167.

²³ Westlake/Galloway 2004, p. 243.

²⁴ The Treaty of Nice: A Comprehensive Guide.

²⁵ The Treaty of Nice: A Comprehensive Guide.

²⁶ Cini 2007, p. 163.

²⁷ Treaty of Nice: A Comprehensive Guide.

²⁸ Cini 2007, p. 86.

²⁹ Sandholz/Sweet 2012, p. 2.

³⁰ Cini 2007, p. 87.

regional groups and private actors would support integration, as they would see their benefits in it.³¹

The theory was very popular among academic circles in the 1960ies, as it seemed to offer a theoretical foundation for the ongoing process of that time. Indeed, many of its core thoughts including the spillover effect were proven right at that time, keeping in mind the movement forward from the European Coal and Steel Community to the Rome Treaty and further and deeper integration.³²

The first big crisis of the European integration process also marked the decay of this theory. The slowing down in the European Community and the Empty Chair crisis showed that the assumption of a steady and ongoing process of integration driven by supranationalist elites was not taking place. Also, the French behaviour made clear that traditional power politics and the preservation of national interests were still decisive factors in Europe.³³

In the wake of the Luxembourg compromise and the perceived stop of the self-fuelling integration in Europe, Intergovernmentalism emerged as the other main theory in explaining regional cooperation. Based on the writings of Stanley Hoffmann it succeeded in convincing academic scholars in the 1970ies and 1980ies, also a time of 'Eurosclerosis' and a slow and difficult integration process. Unlike Haas who looked at private interest groups and supranational elites as decisive actors, Hoffmann's conceptual approach is centered on the national states and is rooted in the classical, realist theories of International Relations.³⁴

The Luxembourg Compromise was largely seen as disproving Neofunctionalism and proving the intergovernmentalist thesis.³⁵ According to the proponents of this school, nation states act rationally, thus using regional integration only as means to serve their own interests. This is usually characterized by a 'bargaining process', in which each state tries to reach the most for itself, which often becomes apparent in tense situations.³⁶

As France was in 1966 certainly the most powerful Member State, with a policy of aiming for national greatness and independent, it could easily use its position to force the other Member States in accepting its demands. However, some believe that the others were glad to give in as they secretly agreed with this confirmation of the intergovernmental element of the community.³⁷

Intergovernmentalism seems therefore to be indeed a valuable tool to explain patterns in the European Union's history and clearly matches the situation leading to the Luxembourg Council.

4. *The Luxembourg Compromise and its Aftermath*

As I have laid out previously, the Empty Chair Crisis and the subsequent Luxembourg Compromise was perhaps the first crisis of the young European Community. The Luxembourg Compromise had three immediate and lasting consequences on a material level: It reduced the legislative in- and output, since the requirement on unanimity made Member States reluctant to bring forward proposals. Furthermore, ambitious proposals were not

³¹ Ibid.

³² Sandholz/Sweet 2012, p. 2.

³³ Ibid.

³⁴ Cini 2007, p. 100.

³⁵ Chrysoschoou, p. 66.

³⁶ Ibid.

³⁷ Golub 2007, p. 282.

submitted either, as the Member States' veto made them unlikely to succeed. And thirdly it slowed down decision-making in general, as the negotiations took longer time and were more important.³⁸

Apart from these concrete effects, it also changed the spirit of the European project. The honeymoon of the first years was gone, the dogmatic predictions of an steady and self-fuelling integration process made by the (Neo)functionalists were proven wrong. Instead it was suddenly clear, that single Member States (in this case France) would put their national interests over the well-being of the community, if they find this necessary. In hindsight, this seems not to be a spectacular outcome and many realists could have predicted this, but nevertheless it stalled the process of European integration for a long time, arguably even until the Single European Act was passed in 1986.³⁹

Moreover, the French refusal to accept Qualified Majority Voting in the Council, as previously agreed on in the Treaty of Rome, also had long-term repercussions in the EC's - and the later the EU's - institutional framework. The supranational character of the organization was to some degree weakened and the Council become the single most powerful organ. Also, the unanimity requirement and the Veto power if "vital national interests" are at stake, made clear that the Member States could block decisions as a solution of last resort.⁴⁰

Whether and when the veto possibility of the Luxembourg Compromise was used, is hard to ascertain. It lies in the nature of the compromise that only the threat to block a decision or even the open display of discontent could trigger renewed negotiations to reach unanimity. Furthermore, even this was often unnecessary as all actors were well aware of this possibility, thus only bringing forward proposals which all Member States are likely to agree on.⁴¹

According to some scholars the Luxembourg Compromise's veto has been lastly invoked by Germany in 1985 and is "dead" today.⁴² Nevertheless, keeping in mind the nature of the Compromise as described above, this can easily be falsified. On the contrary, the concept seems very much alive, however, "usually in a deep sleep, but subject to very occasional awakening".⁴³

Nevertheless, it is obvious that in a EU of 27 Member States works differently with the Western European alliance of the 1950ies consisting of six states.

After the accession of Finland, Austria and Sweden the total votes grew to 87, changing the Qualified Majority to 61 and the blocking minority to 26 votes. At a special conference in Ioannina the Member States therefore agreed on a special arrangement: The official blocking minority remained 26 votes, but 23 votes are sufficient to force the Council to reach a compromise within reasonable time.⁴⁴ Indeed, this arrangement can be seen as a comeback of the Luxembourg Compromise and an adaption to the new realities of the EU of twelve member states.

This topic was also at the core at the negotiations on the Treaty of Nice and came up again very recently in 2007. The current legal framework is in some way even more confusing and complicated than the original veto power of 1958. Unlike previously interended, the voting method of double majorities will only be applied from 2014 on and will fully enter into force from 2017. Furthermore, the Ioannina compromise was again confirmed in a perhaps even stronger way: The Council will from 2017 be forced to reach unanimity even in matters that

³⁸ Golub 2007, p. 282.

³⁹ Ibid.

⁴⁰ Dinan 2010, p. 167.

⁴¹ Ibid.

⁴² Nedergaard 2007, p. 168.

⁴³ Nugent 1999, p. 121.

⁴⁴ Dinan 2010, p. 167.

actually only require a Qualified Majority if at least 24,75% of the Member States, representing at least 19,25% of the population demand so.⁴⁵

The process which has begun in Luxembourg in 1966 has therefore evolved to a pattern which repeated itself over the history of the European Union. The Ioannina Compromise, the Treaties of Nice and Lisbon all confirmed and adapted the Compromise to the current situation. The intergovernmental element in the Council and the Veto power of single member states (or an alliance of a few) is therefore very much alive: The shadow of the Luxembourg Compromise still reaches to the present.

5. *Conclusion*

Based on this analysis of the development and outcome of the Empty Chair Crisis and the subsequent Luxembourg Compromise I did not only try to explain it by utilizing the conceptual approaches of Neofunctionalism and Intergovernmentalism, but also to follow the content of the Luxembourg Compromise through the time.

During the development of the European integration process, this agreement has changed its forms and precise details many times, but could retain its content – making the Council an essential intergovernmental organ of the European Union and safeguarding the Member States' veto right.

Even though, the enlargement of the Union made an adaption of this compromise necessary and one single state can nowadays not officially block a decision, already a small minority is sufficient to change a decision based on a Qualified Majority to a vote requiring unanimity.

The Luxembourg Compromise therefore proved to change the course of European integration fundamentally and still exercises great influence on the Council's voting method, making unanimity the ideal situation which is always aimed for. With regards to the many opinions stating that the Luxembourg Compromise 'died' in the 1980ies, I can conclude: There is life in the old dog yet!

⁴⁵ The Treaty of Nice: A Comprehensive Guide.

DECISION-MAKING BY CONSENSUS: BY DEFINITION A BAD THING?

Johanna Hagenauer

1. Introduction

The Council of Ministers ('the Council') is arguably the most powerful organ of the European Union (EU). It has traditionally been considered as the main decision-maker of the European Union, even though the European Parliament has increasingly been accounted decision-making power up to equal status under the co-decision procedure in the Maastricht Treaty. In fulfilling this task the Council officially decides on matters using the formal voting method of either qualified-majority voting (QMV)¹ or unanimity. However, traditionally the Council of Ministers is eager to reach consensus, without the use of any vote, and hence approximately 65% of the decisions are based thereon. The avoidance of formal and transparent forms of decision-making adds to the various vital claims of democratic deficit, often associated with the Council.² The conventional secrecy of the Council's deliberations only furthers the claim of a lack of transparency.³ In the light of the call for a transition to formal decision-making by QMV, one may equally ask why consensus is aimed at by the Council?

This article aims to examine the underlying rationale of the institution of consensus, its possible disadvantages and benefits, and the question whether formal voting methods should be preferred to consensus. First, an overview about the historic development of decision-making in the Council will be provided, taking into account events like the infamous Luxembourg Accords of 1966 that provide the starting point of the development of the informal method of consensus. This is important to understand the nature of consensus and the reasons why it initially evolved. Second, the practise of decision-making by consensus and its main characteristics will be outlined. Third, an evaluation of possible concerns about this informal norm will be presented. Fourth, possible reasons underlying the preference for consensus will be assessed. Finally, a conclusion will be drawn on the findings of the article, in which it will be argued that a transition to QMV in the Council is neither feasible nor desirable.

2. Evolution of Decision-Making in the Council

To understand the informal method of consensus, it is necessary to discuss certain historical events that have shaped decision-making as it exists today in the Council. Originally, at the time of the establishment of the European Economic Community (EEC) under the Treaty of Rome in 1957, the main form of voting was unanimity.⁴ This meant that in order to come to a

¹ Art. 16 TEU read in conjunction with Art. 3 of Protocol (No 36) on Transitional Provision holds currently for a system of weighed votes whereby an act shall be adopted by a number of votes representing at least a majority of Council members, if the proposal originated in the Commission, and representing two thirds of Council members in other cases. Furthermore a member of the Council may request, where an act was adopted by qualified majority, to check whether the Member States comprising the qualified majority also represent 62% of the total population of the Union. If this is not the case the act shall not be adopted.

² See: D. Heisenberg, 'The institution of 'consensus' in the European Union: Formal versus informal decision-making in the Council', *European Journal of Political Research* (2005); and S. Novak, *L'opacité du consensus – La Prise de Décision au Conseil de L'Union européenne*, available at <www.laviedesidees.fr> (last visited 31.05.2013).

³ D. Heisenberg, *European Journal of Political Research* (2005), p.82.

⁴ N. Foster, *EU Law Directions* (2nd edition, Oxford University Press, Oxford 2008), p. 19.

decision all of the six core Member States had to agree. This form of decision-making hence provided the Member States with the opportunity to effectively veto a decision they did not favour. However, it was already realised at the time the Treaty of Rome was signed that there was a need for a more efficient form of decision-making. This need, in time, called for the introduction of QMV in the Council.⁵

2.1 Luxembourg Accords

There were however opponents to a transition to QMV. Amongst them was French President of that time Charles de Gaulle, who strongly opposed a proposal in 1965 providing for, amongst other measures, the introduction of QMV.⁶ The French President feared the loss of national sovereignty to an unacceptable extent by approving a proposal of such ‘federalist logic’.⁷ As a consequence of the failure to come to a compromise in the Council, De Gaulle refused to attend any Council meetings until this matter was resolved. This essentially blocked all Council activity, creating a deadlock since all other Member States were unable to make decisions because unanimity was required. The period of French non-attendance in the Council, which lasted seven months, became known as the ‘empty chair crisis’, which was resolved in the Luxembourg Accords in January 1966.⁸

The infamous Luxembourg Accords were essentially ‘an agreement to disagree’ with regard to voting methods in the Council.⁹ It provided for something akin to a veto for Members States in cases where an agreement appears to be impossible and where national interests of any Member States were at stake.¹⁰ Since there was no clear definition of the term ‘vital interests’, the Member States themselves were left with the task to interpret what it meant. Deliberations would therefore continue, sometimes extensively, until consensus was reached and therefore QMV became rather an exception than the norm.¹¹ This development was considered to be a ‘return to intergovernmentalism’¹² and had its impact on the dynamic and efficiency of Council decision-making and the therewith the pace at which Community goals were achieved. This historical event, resulting in a period of stagnation, can also be regarded as setting the stage for the development of a ‘culture of consensus’, as it exists today, based on over 40 years of conventional practice.

2.2 The Single European Act

After approximately twenty years of political malaise in the Community an attempt for institutional revitalization was made in the 1985 Single European Act (SEA) providing the extension of QMV in the Council for a range of areas previously voted on by unanimity. The aim was to improve the efficiency of the Council by eliminating the possibility of a veto for the Member States.¹³ The measures introduced by the SEA were regarded as the effective statutory introduction of QMV in the Council.¹⁴

⁵ Ibid.

⁶ P. Craig *et al*, *EU law – Text, Cases and Materials* (5th edition, Oxford University Press, Oxford 2008), p. 7.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

⁹ N. Foster, *EU Law Directions*, p. 19.

¹⁰ I. Bache *et al*, *Politics in the European Union* (3rd edition, Oxford University Press, Oxford 2011), p. 129.

¹¹ P. Craig *et al*, *EU law – Text, Cases and Materials*, p. 8.

¹² Ibid.

¹³ I. Bache *et al*, *Politics in the European Union* (3rd edition), p. 154.

¹⁴ J. Tallberg, ‘Explaining the institutional foundations of European Union negotiations’, *Journal of European Public Policy*, 17:5 (2010), p. 640.

2.3 Decision-Making in the Council Today

Under the current Treaties, the Council votes either by unanimity or QMV, whereby according to Art. 16(3) TEU QMV is the default method of decision-making. However, decision-making by consensus remains to be the preferred method and in fact in the period between July 2009 and June 2012 65% of the decisions for which QMV would have been sufficient were made by consensus.¹⁵ But why would the Council put itself under the higher burden of deliberations needed to reach consensus in cases where an easier method of decision-making is available? The official statement provided by the Council is that its aim is to 'shape the policy in such a way that every participant can agree with the final output'.¹⁶ The evaluation of this argument is unfortunately hindered by the difficulty to conduct research about the Council's deliberations due to residual opacity and a lack of data, despite various 'transparency promoting' measures.¹⁷ This will be explained in the subsequent section where the nature and characteristics of consensus will be examined.

3. *What is Consensus?*

'Consensus' is often confused with unanimity, as in both decision-making methods no opposition is apparent. However 'consensus', unlike unanimity, does not constitute a formal method of voting but rather holds for deliberations until all opponents are appeased by way of bargaining, concessions, package deals and vote exchange. The result is the same: it seems like all parties agree. However, in the case of 'consensus', this might be an illusion. To assess this argument and other concerns being raised about the informal norm of consensus of the Council, one has to take a closer look at the actual the decision-making practices.

As already mentioned, the possibility of assessing the Council's voting methods is significantly impaired since most decisions are still made behind closed doors, while transparency measures like public sessions have a theoretical effect only.¹⁸ Despite these obstacles, a few authors have still tackled the task to shed light using the empirical methods interviewing Member State representatives. Being aware of the possible subjective nature of the ministers' statements, one has to be cautious when drawing conclusions. However, keeping in mind the lack of other means to assess the Council's decision-making conduct, it is still achievable to identify certain characteristics.

The official standpoint of the interviewed ministers is that QMV is still systematically used when the treaty article provides for it.¹⁹ This rests on the assumption that the Presidency of the Council is aiming at the highest level of efficiency passing as many laws as possible, which is easier under QMV because opposing Member States presenting a minority are simply outvoted. However, there are certain informal rules grounded in political realism that apply in exceptional cases: large Member States shall not be marginalised in their will and passing a law may be delayed when vital interests of a Member State are endangered.²⁰ The latter shows significant resemblance to the agreement of the Luxembourg Accords and symbolises to what

¹⁵ Vote Watch Europe, *The Voting Records of EU Member States in the Council since 2009- Annual Report July 2012*. (2012), p. 8.

¹⁶ *Ibid.*

¹⁷ A. Wartjen, 'Decision-making in the Council of the European Union', *Journal of European Public Policy*, 17:5 (2010), p. 671.

¹⁸ S. Novak (2009), p.12.

¹⁹ *Ibid.*, p. 4.

²⁰ *Ibid.*, p. 5.

a great extent the present form of decision-making by consensus is based thereon.²¹ Former Finnish minister for Foreign Affairs Erkki Tuomioja stated: ‘At the end of the day, you can block. Moving forward at the European Council depends on consensus. In general there is still this kind of understanding, although no one talks about the Luxembourg Compromise any longer [...] If a country’s vital national interests are at stake, this is respected.’²²

3.1 Before the Plenary Session

Formal voting is, however, rarely used in the plenary sessions. In practise the Presidency makes a proposition and if no objections are raised it is declared as passed. It has been observed that there is rarely any opposition,²³ but does this mean that all Member State representatives fully agree? The assumption is that there are negotiations between the ministers even before the stage of plenary session is reached, in which bargaining and vote trading is taking place.²⁴ Member State X may for example promise his vote on a particular matter, although not being completely satisfied with it, to another Member State Y in exchange for Y’s vote in another area of particular importance for X. Furthermore, there is bilateral communication between the Member State representatives and the Presidency in which the ministers hint at their view to the Presidency and possible concessions are discussed.²⁵

3.2 In the Plenary Session

Despite extensive communication, both between the Member State representatives amongst themselves and between them and the Presidency, the plenary session itself is characterised by the participants being unclear about their position.²⁶ All participants of the plenary session make mental calculations in order to assess if there is a blocking minority. Member State representatives, aware of belonging to a minority opposing a measure, realise the risk of being outvoted by the majority and are unlikely to raise their opposition.

There are several reasons for this conduct: Firstly, the ministers do not want to be perceived as dissenting by their peers and possibly offend them, which might in turn lead to their unwillingness in future deliberations.²⁷ Secondly, they deem it to be useless to vote against the measure knowing that their vote will not change the outcome.²⁸ Thirdly, they want to avoid possible embarrassment and humiliation of being defeated.²⁹ Most importantly, however, they run the risk of missing out on possible concessions made by the Presidency, as the latter could simply initiate a formal qualified majority vote in which case the minority would simply be outvoted without any further discussion.³⁰

This conduct, as mentioned before, results in opposition being rarely made when the Presidency introduces a proposal. Formal decision-making by vote therefore will not take place since it appears unnecessary. This effect is only furthered by the fact that the Presidency

²¹ D. Heisenberg, *European Journal of Political Research* (2005), p. 68.

²² J. Tallberg, *Journal of European Public Policy*, 17:5 (2010), p. 695.

²³ Vote Watch Europe, *The Voting Records of EU Member States in the Council since 2009- Annual Report* July 2012, p. 9.

²⁴ A. Wartjen, *Journal of European Public Policy*, (2010), p. 668.

²⁵ J. Tallberg, *Journal of Common Market Studies*, Volume 46, No.3 (2008), p. 696.

²⁶ S. Novak (2009), p. 6.

²⁷ *Ibid.*

²⁸ S. Novak, ‘Transparency versus Accountability? – The Case of the EU Council of Ministers’, *Transatlantic Conference on Transparency Research Utrecht* (2012), p. 18.

²⁹ S. Novak (2009), p. 8.

³⁰ *Ibid.*, p. 7.

is unlikely to use his or her right to force the Member State representatives to formally vote, in order to avoid revengeful consequences once the Presidency has ended.³¹ All these conventional practices can be explained by power plays, which evolved over almost half a century with the Luxembourg Accords as their starting point.³²

These informal practises have been highly criticised in literature on various grounds, amongst them being a lack of transparency and democratic deficit. The next section will focus on the evaluation of some of these concerns.

4. *Evaluation of Possible Concerns about 'Decision-Making by Consensus'*

4.1 Democratic Deficit

One of the main arguments against decision-making by consensus within the Council, advanced by critics is the claim that it results in a democratic deficit.³³ The absence of a formal voting mechanism, in which every Member State representative gives his vote and therewith makes clear what his position is, deprives the Council of an important democratic element: transparency. The resulting opacity makes the law-making on EU level even more inaccessible as it only adds to the complexity of EU law which it seems is hard to grasp for the ordinary EU citizen.³⁴ Allowing democratically elected Member State representatives, who are formally obliged to vote on measures that will be binding upon their states' citizens, to make deals in secrecy by way of bargaining might induce some confusion and frustration among citizens and may create problems of the legitimacy of the EU.³⁵ Given the Council's main rationale for using consensus is solidifying of legitimacy of the EU in the eyes of the citizens, by way of appearing to be 'speaking in one voice' (see below), there seems to be a paradox.

4.2 Accountability

The severe lack of information about the positions of the Member States representative also raises the issue of accountability on the national level.³⁶ Member States can choose to make their positions, and therewith their 'loser status' in case of abstention or vote against, within the Council public, however there is no obligation to do so common to all Member States.³⁷ Publishing information about deliberations and their position therein provides state representatives a chance to show their opinion concerning certain matters and can be regarded as necessary in light of their accountability to the citizens they represent. However, most governments strongly advise their ministers to remain silent about their defeats.³⁸

This behaviour can be explained by various considerations: Firstly, ministers want to save themselves the embarrassment of admitting defeat. Secondly, state representatives might be concerned about their position in national politics, as citizens may recognise their defeat as a result of poor negotiation skills and therefore doubt their political abilities. Thirdly, there is

³¹ Ibid, p. 7.

³² D. Heisenberg, *European Journal of Political Research* (2005), p. 68.

³³ Ibid, p. 65.

³⁴ P. Schmitter, 'Democracy in Europe and Europe's democratisation', *Journal of Democracy* 14.4 (2003), p. 73.

³⁵ D. Heisenberg, *European Journal of Political Research* (2005), p. 83.

³⁶ S. Novak (2009), p. 9.

³⁷ D. Heisenberg, *European Journal of Political Research* (2005), p. 83.

³⁸ S. Novak (2009), p. 8.

the issue of passing a law in the national government, which the particular minister has originally opposed on a supranational level.³⁹ Not revealing their defeat to national journalists, non-governmental organizations, political opponents and last but not least voters raises doubts about their legitimacy in the light of democratic accountability.⁴⁰

4.3 Disadvantaged Member States

Another criticism frequently advanced is that some Member States might be disadvantaged under the informal method of consensus. Two groups of Member States may be subject to this claim both of which will be considered below: firstly, new Member States that have accessioned to the EU, and secondly, small Member States.

It has been mentioned above that the institution of consensual decision-making is essentially based on conventional practices that have developed since the Luxembourg Accords. Practicing negotiations and deliberations repeatedly with the same participants over a long period of time provides these participants certain knowledge about each other's preferences and characteristics which may transform decision-making into a transaction rather than bargaining.⁴¹ It only logically follows from this assumption that newly accessioned Member States will have a great disadvantage when entering this playing field, which is vastly unknown to them. In fact, it was assumed that the enlargement of the EU in 2004, accessioning ten new Member States, would drastically change the decision-making dynamics within the Council.⁴² The assumption was that QMV would be applied more often since decision-making by consensus will be nearly impossible considering the increased number of state interests that had to be taken into account.⁴³ However, while it was evident that the Council meetings lasted considerably longer it was also observed that Member State representatives recorded their oppositions to proposals less frequently after the enlargement than in the period beforehand.⁴⁴ This suggests the 'culture of consensus' was upheld. This claim is supported by the observation of Sweden's voting behaviour shortly after its accession: it initially voted very often against proposals, despite the fact that explicit 'no votes' were rare in the Council. Later, it changed to a less obstructionist position within the Council which was interpreted as Sweden's adaption to the 'culture of consensus' by way of learning.⁴⁵

The second group of Member States, which might also be put at detriment under the informal norm of consensus, are small Member States. One of the informal rules of the Council is not to marginalise large Member States in their will.⁴⁶ This practise provides for significant power for larger Member States potentially pressuring smaller Member States into taking decisions, which are not necessarily optimal for them.⁴⁷ This assumption is reinforced by the reluctance of Member State representatives to voice their opposition once realizing they are in a minority. Furthermore, there is a high level of sensitivity not to offend fellow ministers with a view on one's own bargaining position in future deliberations.⁴⁸ This may especially hold for

³⁹ Ibid.

⁴⁰ S. Novak (2009), p. 9.

⁴¹ D. Heisenberg, *European Journal of Political Research* (2005), p. 69.

⁴² S. Hagemann *et al.*, 'Decision-Making in the Enlarged Council of Ministers: Evaluating the Facts', *Centre for European Policy Studies – CEPS Policy Brief No.119*. (2007), p. 1.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ A. Wartjen, *Journal of European Public Policy*, 17:5 (2010), p. 673.

⁴⁶ S. Novak (2009), p. 5.

⁴⁷ D. Heisenberg, *European Journal of Political Research* (2005), p. 84.

⁴⁸ S. Novak S. Novak (2009), p. 9.

smaller Member States since their bargaining power might not be as strong from the beginning.

Despite concerns about the lack of political legitimacy and accountability due to the absence of a voting process of the Council, the 'culture of consensus' persists as the preferred method. In order to objectively assess the informal method of consensus it is important to also evaluate factors that might support its use. The following section will review arguments in favour of informal consensus over formal voting.

5. *Evaluation of Possible Reasons Underlying a Preference for Consensus*

5.1 Fairness through Bargaining

The primary argument advanced by the Council is that decision-making by consensus rather than QMV is used in order to reconcile all different positions, taking also the minority view into account, to satisfy all participants.⁴⁹ In fact, it could be argued that while in the case of QMV individual preferences of the minority are simply ignored, decision-making by consensus provides for better protection of their concerns.⁵⁰ It is assumed that informal deliberations and negotiations facilitate bargaining, in which the minority is given a chance to demand compensation in other areas. This would lead to the conclusion that the informal working of the Council, including vote-exchange, package deals and concessions, would create an overall higher achievement of individual interests of the Member State representatives, while at the same time not compromising the acceptance of the proposal. One has to bear in mind, however, that there are, as mentioned above, considerable power plays within the Council, which might work to detriment of smaller or new Member State's interests.

5.2 Solidifying Legitimacy

Another argument closely connected to the preceding one is that decision-making by consensus creates greater legitimacy of the EU on a national level.⁵¹ The effects of consensus are, as previously mentioned, from an outside perspective the same as the effects of a formal voting of unanimity, namely the outer appearance of all Member States agreeing. The fact that the extensive bargaining and informal deliberations that lie at the heart of the 'culture of consensus' happen mostly in secrecy, however, only creates an illusion of 'complete agreement'. This is furthered by the trend of Member State representatives not to publish their opposing positions on a national level. As a consequence, the Council seems to speak with one voice, which might have the positive effect of supporting the EU's legitimacy in the eyes of citizens, even if it is based on an illusion created by secrecy and opacity.⁵² The desired effect is the implementation of EU measures, which could have possibly been compromised in Member States that initially opposed them, had their representatives' original opposition been made public.⁵³

⁴⁹ A. Wartjen, *Journal of European Public Policy*, 17:5 (2010), p. 670.

⁵⁰ D. Heisenberg, *European Journal of Political Research* (2005), p. 83.

⁵¹ *Ibid.*, p. 82.

⁵² *Ibid.*

⁵³ S. Novak (2009), p. 3.

5.3 Efficiency and Time

It would seem that the strongest argument in favour of consensus is the aspect that it can provide for improved efficiency that results from over 40 years of conventional practices. It might be argued that the Council participants are familiar with each other's preferences and characteristics from the work experience they share, creating a certain common understanding, which makes the decision-making process easier to a certain extent.

There is another aspect closely connected to this argument, which relates to the element of time, holding that this common understanding of the Council members also speeds up the process of decision-making. Paradoxically the main claim made by advocates of QMV, is that QMV would expedite the process, as a vote would replace hours of deliberations, which would be continued until all participants are satisfied with the outcome. This argument can, however, be somewhat invalidated when considering the fact that all informal negotiations in reality actually happen before the plenary session, so that they do not contribute to the length of the Council sessions and that the simple approval of the proposal as it happens under consensus might even be quicker than conducting a formal vote. Furthermore, data provides little evidence that consensus slows down the process of decision-making.⁵⁴

6. *Is a Transition to Formal Voting Methods Feasible and Desirable?*

As the decision-making of the Council, as it exists today is the result of decades of conventional practices, there is significant reluctance towards change. The fact that newly accessioned Member States only initially diverge from the norm of consensus but later adapt⁵⁵ only underlines the idea that the Council Members do not see any need for change, which makes a transition seem very unrealistic.

Even if the decision-making by formal voting would be made obligatory, it is unlikely that the informal negotiations before the official Council sessions, including the bargaining and vote exchange, would cease to exist. Member State representatives would still try to make the best possible 'deal'. In practice the results would be same: deliberations happened beforehand and are only confirmed in the plenary session. Just that now this happens by a vote and not by mere silence when the Presidency asks for opposition. Consequently, one might raise the claim that by replacing the 'silent agreement' with a possibly lengthy procedure of formal voting, the efficiency and promptness with which decisions are made within the Council will be hindered. This invalidates the often-purported argument QMV would speed up the process of decision-making and raises doubts about the desirability of a transition to a formal method of voting.

It is difficult to refute the claims of opacity and lack of democratic characteristics, since the lack of formal open voting is inherent in concept of consensual decision-making. However, the lack of information about the individual positions on a national level can be regarded as a consequence of the reluctance of Member State representatives to make them public. It should therefore be the task of national law to counteract this conduct and it would thus be unfair to blame the Council's working for the opacity this behaviour creates. Furthermore, one may regard this lack of information and democratic characteristics, as being a necessary burden that one has to be willing to accept as a by-product of efficient decision-making on EU level.⁵⁶

⁵⁴ J. Golub *et al.*, 'How Time Affects EU Decision- Making', *European Union Politics Vol. 8(4)* (2007), p. 565.

⁵⁵ J. Tallberg, *Journal of European Public Policy*, 17:5 (2010), p. 643.

⁵⁶ S. Novak (2009), p. 11.

The most important question seems to be, however, to what extent the informal and opaque character of the Council's deliberations and bargaining practices actually differs from the conduct common to national politics. It almost counts as common knowledge that informal meetings outside the usual settings in which formal decisions are being taken are part of day-to-day politics. This does, of course, not mean that these informal practices have to be regarded as being appropriate behaviour, however we ought to recognise that we cannot deny their existence and we might even be too hasty in condemning them.

7. Conclusion

In the end, democratically elected Member State representatives are sent to the Council in order to achieve the best possible outcome for the citizens of their states (and arguably for the EU) and this is what they are attempting to do. One might not be entirely comfortable with the way they approach this task, raising concerns about a lack of democratic legitimacy, transparency and accountability. However, should it not be the outcome that matters? And, if so, keeping in mind the fact that decision-making by consensus facilitates bargaining, which in turn might provide for a better protection of each Member States' interests, one should appreciate the advantages of consensus rather than focussing on its weaknesses. After all, the 'culture of consensus' is exactly that: a culture that has evolved over decades and has proved its efficiency and also benefits.

CONSENSUS DECISION: AN EU ASSET?

Berit Gleixner

1. Introduction

Many analysts had predicted that the enlargement of the EU through the admission of many new Member States was to bring decision-making in the Council of Ministers to a halt. However, as has been observed by many authors, this has not materialised; the EU and especially the Council of Ministers has been able to continue to legislate and to further deepen integration.¹ However, until today it is hard to grasp and fully understand how the decision making in the Council takes place. This is due to the fact that decision-making in the Council usually takes place ‘behind closed doors’, by the informal way of consensus.

Since 1993, after the Danish population rejected the Maastricht Treaty in a referendum, the results of voting had to be made available to the public.²

It is also provided in Art. 15 of the Treaty on the Functioning of the European Union that decision-making in the Union institutions should be made as transparent as possible. However, the lack of transparency is maintained: through informal decision-making in the Council the real opinions of individual ministers remain in the shadow of the consensus vote.

This essay first aims to identify the main types of decision-making procedures used in the Council. After identifying these procedures, they will be analysed from a historic perspective. This will be followed by a discussion of different trends that have been identified through studying voting data of the Council. Finally, the advantages and disadvantages of decision-making by consensus will be weighed before reaching a conclusion and answering the question of whether decision-making by consensus in the Council of Ministers really is an EU asset.

2. Decision-Making in the Council

The three main institutions that take part in the legislative process of the European Union are the Commission, the Council of Ministers, and the European Parliament.³ The Council is composed of ministers representing the National Member States.⁴

The role of the Commission is to ‘promote the general interest of the Union and take appropriate initiatives to that end’⁵ It acts as the most significant initiator for legislation in the Union.⁶ Both the Council and the European Parliament, upon proposal by the Commission, have the power to approve or reject the Commission’s proposals.⁷ Depending on the proposal

¹ Heisenberg, ‘The Institution of ‘Consensus’ in the European Union: Formal versus Informal Decision-Making in the Council’, 44 *European Journal of Political Research* (2005), p. 67.

² Novak, ‘The Opacity of Consensus, Decision-making at the Council of the European Union’, p. 9, available at <http://www.booksandideas.net/IMG/pdf/20111124_opacity-consensus.pdf> (last visited 05.12.2012).

³ Golub, ‘In the Shadow of the Vote? Decision Making in the European Community’, 53 *International Organization* (1999), p. 734.

⁴ Art. 16(2) Treaty on the Functioning of the European Union (hereinafter TFEU).

⁵ Art. 17 (1)&(2) Treaty on the European Union (hereinafter TEU). Art. 17 (2) TEU provides that: ‘Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise’.

⁶ Ibid.

⁷ Art. 16(1) TEU: ‘The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions’.

at hand, the Council will act either by qualified majority voting (QMV) or by unanimity, as provided for in the legal basis on which the proposal is based.⁸ Although the European Parliament's importance in the legislative process has been gradually increased (from a consultation procedure, to cooperation under the Single European Act, and later to a co-decision introduced by the Maastricht Treaty), the Council of Ministers remains the most important and most influential body in the legislative process.⁹

Furthermore, mention must be made to an important working body in the Council of Ministers, the Committee of Permanent Representatives (Coreper). Coreper is composed of permanent national officials and is made up of two bodies Coreper I and Coreper II. Coreper I, concerns itself with topics such as the internal market and the environment whereas Coreper II deals with the more controversial matters such as external relations, economic and financial affairs; and it is therefore more significant of the two. The reason why Coreper II is so important is because it plays an active role in EU decision-making. The proposals coming from the Commission will be considered by Coreper, prior to being tabled in the Council. The proposals will either belong to part A of the agenda, or to part B. The ones belonging to part A are those proposals which do not need further discussion and only need approval, whereas the ones belonging to part B still need to be discussed. The interesting point here is that decision-making in Coreper is made by consensus, and not by QMV. This means in essence that before proposals even reach the Council, they have already been so thoroughly discussed that most likely compromises between the permanent representatives have been made as to prepare a proposal that will more or less satisfy all the ministers in the Council.¹⁰

3. *Qualified Majority Voting, Unanimity and Consensus*

As stated above, the decision-making in the Council will be made by either of two formal ways: either by qualified majority or unanimity. However, there is a third informal way of decision making that is put to use in the Council of Ministers, which is known as the procedure of consensus.

The official rule is that the Council will take decisions by QMV, unless the Treaty provides otherwise. Under the current rules of QMV, each country's vote is weighed, meaning for example that big countries such as Germany, the United Kingdom, Italy and France's votes will be weighed as counting for twenty-nine votes. In contrast the smallest countries such as Malta, Luxembourg and others votes will only be weighed as three or four votes. If the proposal came from the Commission, the act will be adopted if there is a minimum of 255 votes in favour, which represents 62 percent of the total Union population.¹¹ Through the Lisbon Treaty, new votes of QMV have been put in place, which will start to be enforced on the 1st of November 2014. Under these new rules, a qualified majority consists of: '55 percent of Council Members, including at least fifteen of them and representing Member States which have at least 65 percent of the population of the Union'.¹² Furthermore, an additional hurdle has been added. Under the new rules, a blocking minority must be composed of at least four Council members.¹³ However, between 1 November 2014 and 31 March 2017, when a

⁸ Art. 16(3) TEU.

⁹ Heisenberg, 'The Institution of 'Consensus' in the European Union: Formal versus Informal Decision-Making in the Council', 44 *European Journal of Political Research* (2005), p. 67.

¹⁰ P. Craig, C. de Búrca, *EU Law: Text, Cases and Materials*, (Oxford University Press, Oxford 2008), p.7.

¹¹ Art. 3, Protocol No. 36 on Transnational Provisions.

¹² Art. 16(4) TFEU.

¹³ Ibid.

legislative act is supposed to be adopted by QMV, a minister in the Council may demand that the rules applicable before November 2014 are used.¹⁴

Unanimity demands that all members in the Council are in agreement about the legislative act. Essentially, this means that each member in the Council retains a veto, and if only one member opposes the proposal, it will not be passed. Hence unanimity is the most circumstantial way to pass a proposal.

Even though it is provided for in the Treaty, the Council rarely acts by using qualified majority, but rather makes decisions informally by consensus.¹⁵ It must be understood that decision-making by consensus, although the final decision means unanimity, is not equivalent to unanimity. For unanimity, there will be 100 percent agreement, therefore all present will completely agree with everything. However, with consensus this is different, consensus is more of a bargain where different interests will be weighed, and a solution will be found that more or less satisfies everyone. Consensus is, in a way, a compromise between different views and preferences of the Member States. Therefore, even though publicly it is stated that all Member States were in favour this is not the reality. This issue will be analysed in further depth in the following sections.

Why the Council chooses to make decisions by consensus, instead of using QMV, is a question that arises. A good way to understand and make sense of this is to go back in history and analysing some key events.¹⁶

4. *The Luxembourg Accords*

The most important event in this respect is without doubt the Luxembourg Compromise, where a settlement was reached after the occurrence of the Empty Chair Crisis. Several important events took place between the treaty setting up the European Economic Community and the Single European Act. One of them was the enlargement of the European Community and, more specifically, in 1961 the application of the UK to join. This was met by great resistance from Charles de Gaulle, who showed much discontent with regards to important institutional reforms that had been proposed by the Commission and, more importantly, regarding the choice to alter decision-making in the Council of Ministers from unanimity to QMV (this had been decided previously under the Treaty of Rome). As a result of the difficulties of the Council to reach a compromise on these matters, de Gaulle decided not to attend the Council meetings any longer. This went on for a period of 7 months in 1965¹⁷ and is known as the Empty Chair Crisis.

Following this, a meeting took place in which a compromise was reached, which was called the Luxembourg Accords. In short, this was an 'agreement to disagree' about voting procedures in the Council.¹⁸ The French insisted that even where the Treaty provided to vote by QMV, the dialogue must continue until unanimity has been reached.¹⁹ Here, we can clearly see that what the French in essence aimed and created, was decision-making by consensus in the Council of Ministers. They officially stepped away from the formal decision-making rules. In effect, at the time this meant that France was in some way able to retain its veto, which it would not have been able to do if a proposal was voted on by QMV. The Single

¹⁴ Art. 3(2) Protocol No. 36 on Transnational Provisions.

¹⁵ Heisenberg, 44 *European Journal of Political Research* (2005), p. 68.

¹⁶ Heisenberg, 44 *European Journal of Political Research* (2005), p. 68.

¹⁷ , EU Law: Text, Cases and Materials, p. 7.

¹⁸ *Ibid* p. 8.

¹⁹ *Ibid*.

European Act further extended the use of QMV to many other areas, but most decisions still continue to be made by consensus.²⁰

As argued by Heisenberg (2005), the EU's 'culture of consensus', is the outcome of 40 years of negotiation in the history of the EU.²¹ The EU is what it is today through decades of negotiation, starting from the negotiation to create the European Coal and Steel Community in 1951 and ending with the negotiation to adopt the Lisbon Treaty in 2007. This way of decision-making can thus be said to be inherent in the system.²²

To assess the advantages and disadvantages of decision making by consensus further, it is interesting to analyse which potential factors might influence Council behaviour and also why governments vote against the majority in the Council. The factors taken into account are based on hypotheses that have been formulated by countless authors and have been thoroughly analysed by using voting data from the Council. The most important and most discussed factors include: Ideological factors such as the left-right wing dimension, the amount that Member States contribute to the EU budget, their size and further the importance of the Presidency of the Council.

When looking at the results and trends that were found by analysing voting behaviour, it must however be kept in mind that the data that is made available only concerns legislative acts that have actually been passed. Therefore, no information is made available about legislative acts that have been wholly rejected. This is an important limitation about the data.²³

5. *The Left-Right Dimension*

National politics in the EU Member States have often been determined by the 'left-right dimension'. The integration process of the countries has brought to the effect that national and EU politics have been increasingly intertwined; therefore political positions and views will influence the voting patterns of these countries in the Council. This is directly linked to whether they are pro-integration or whether the country has shown some 'eurosceptical' tendencies. It seems logical to postulate that the more pro-integration the countries are the more likely it is that they will support the vote of the majority in the Council.²⁴ Through analysis of negative votes and abstention in the Council by Governments of three different political backgrounds: left-wing, right-wing, and centrist, Matilla (2004) notes that support for integration does not influence the voting behaviour of left-wing and centrist governments in a significant way. The results for the right-wing governments show that those who support integration, will similarly not vote against the majority. This is in contrast to 'eurosceptical' right-winged governments, which will be the ones that oppose the majority and make their discontent clear.²⁵ There could be two reasons: either these governments are the only ones that dare to show their lack of support, or they simply are not willing to compromise with the other participants.²⁶ When analysing the data, one must however keep in mind that these are merely hypothetical based on assumptions.

²⁰ Heisenberg, 44 *European Journal of Political Research* (2005), p. 68.

²¹ *Ibid.*

²² *Ibid.*

²³ Novak, 'The Opacity of Consensus, Decision-making at the Council of the European Union', p. 9.

²⁴ Matilla, 'Contested Decisions: Empirical Analysis of Voting in the European Union Council of Ministers', 43 *European Journal of Political Research* (2004), p. 32.

²⁵ *Ibid.*, p. 45.

²⁶ *Ibid.*

6. *Net-Contributors vs. Net-Beneficiaries*

There seems to be a further divide in the voting behaviour of net-contributors to the EU budget and net-receivers. The hypothesis that the 'more a country benefits financially from the EU budget the less likely it is to vote against the majority', has been a topic frequently discussed.²⁷ An analysis with two variables shows that a country's contribution to the budget has an impact on its voting patterns, namely that contributors to the budget are 50 percent more likely to cast a negative vote or to abstain.²⁸ It can therefore be concluded that countries that benefit the most from the EU will also support it the most and have a positive attitude towards majority votes.²⁹

7. *Small Member States vs. Big Member States*

A number of studies have shown a possible division between small and large Member States in decision-making. In many studies, the effect of size showed that larger Member States often vote against the majority or abstain and medium-sized and small Member States rarely do so.³⁰ This is rather surprising, as it would be expected that Member State's negative votes or abstentions be distributed evenly. However, as has been noted by Heisenberg (2005), small Member States rarely cast negative votes or abstain, in fact: 'the five largest Member States account for 46 per cent of the votes against, and 54 per cent of the abstentions'.³¹ Another approach on this is taken by Mattila (2004), whose initial argument is that the bigger Member States will rarely oppose the majority.³² As we have seen through QMV, the way the votes are distributed is directly linked to the size of the country. Therefore big countries such as Germany's are weighed as 29 votes, whereas in contrast Malta only has three. The hypothesis was linked to the fact that because the large countries have more votes, they will logically have a higher chance of being on the side that wins. It must also be kept in mind that because the large Member States have so many votes, the proposals will already be made in such way that assures support of the larger Member States, for the proposal to be successful.³³

However, as can logically be expected, the data shows that large countries vote against the majority more often than smaller countries. Several reasons are given to explain this, one of them being that smaller Member States might feel that their position in the EU is not as important, since their number of votes will often not have a significant impact.³⁴ Therefore, smaller countries may apprehend that their resources are rather limited, therefore concentrating their efforts to proposals that are more considerable to them.³⁵ Furthermore, large countries may hang on to their national opinions stronger because of national pride or because of their 'political culture'.³⁶ One can imagine that a country like Germany is much less likely to give up their political views than for instance Malta or Luxembourg.

²⁷ *Ibid*, p. 35.

²⁸ *Ibid*, p. 38.

²⁹ *Ibid*, p. 43.

³⁰ Hosli, 'Explaining Voting Behavior in the Council of the European Union', p.12. Retrieved from samba.fsv.cuni.cz/~gregl1as/workshop/Papers/Hosli.doc, last visited 5 December 2012.

³¹ Heisenberg, 44 *European Journal of Political Research* (2005), p. 77.

³² Mattila, 43 *European Journal of Political Research* (2004), p. 33.

³³ *Ibid*.

³⁴ Heisenberg, 44 *European Journal of Political Research* (2005), p. 77.

³⁵ Mattila, 43 *European Journal of Political Research* (2004), p. 33.

³⁶ Mattila, 43 *European Journal of Political Research* (2004), p. 46.

8. *Presidency of the Council*

A minister representing a Member State holds the Presidency of the Council; this position is rotated regularly.³⁷ Every six months, the position of Council changes and a new Council member takes up the task. During his time in office the President of the Council sets the Agenda for the Council meetings. The position of President has become more and more important over the past years, especially because of the use of informal decision-making.³⁸

On one hand, it has frequently been argued that the President is in a position to exercise tremendous influence on decision-making.³⁹ He will ultimately be the one who decides when consensus has been reached; since instead of requesting the ministers to vote the Presidency makes a proposal and if no one objects to it, announces it as being passed.⁴⁰

On the other hand, it has also often been noted that it might also force the Member State holding Presidency to make huge sacrifices.⁴¹ As regards the voting behaviour of the Representative holding presidency, it makes sense that he or she votes less often against the majority.

On the whole, holding the Presidency may also be very beneficial towards influencing future behaviour of that minister, since being in the position enables the representative to comprehend other opinions and take into account views of other representatives.⁴²

9. *Advantages and Disadvantages of Decision-Making by Consensus*

In order to define whether decision-making by consensus really is an asset for the EU, the advantages and disadvantages of consensus, must be weighed.

Firstly, a clear advantage of decision-making by consensus is that it facilitates bargains and that it is an efficient way of passing legislative acts. The way that the Council works is that there is no secrecy about the positions that a country has, because the open dialogue that precedes consensus will make it necessary to communicate with the other representatives. Therefore, each participant knows what the other countries standpoint will be, and each minister will know what the other will demand.⁴³

Further, even though ministers might not agree on several points in the proposal they will vote positively anyways. Decision-making by consensus makes it possible that a decision is reached without threatening the authority of EU law by not making 'losers' apparent.⁴⁴ It is very much so that it is not in the ministers' interest to show that they have been defeated⁴⁵. This may be for several reasons. The most important seems to be, that if the ministers make apparent that they did not support the law that has been passed, it becomes increasingly difficult to implement it at national level.⁴⁶

However, in spite of these apparent advantages, one can immediately identify a pitfall: there is a lack of 'democratic legitimacy', caused by an evident deficiency of information about the legislative process. Citizens remain in the dark about what is really happening behind closed

³⁷ Art. 16(9) TEU.

³⁸ , EU Law: Text, Cases and Materials, p. 242.

³⁹ Warntjen, 'The Council Presidency, Power Broker or Burden? An Empirical Analysis', 9(3) *European Union Politics* (2008), p. 316.

⁴⁰ Novak, 'The Opacity of Consensus, Decision-making at the Council of the European Union', p. 3.

⁴¹ Warntjen, 9(3) *European Union Politics* (2008), p. 334.

⁴² Mattila, 43 *European Journal of Political Research* (2004), p. 82.

⁴³ Heisenberg, 44 *European Journal of Political Research* (2005), p. 69.

⁴⁴ *Ibid.*, p. 82.

⁴⁵ *Ibid.*, p. 8.

⁴⁶ Novak, 'The Opacity of Consensus, Decision-making at the Council of the European Union', p.10.

doors.⁴⁷ It leaves the intergovernmental and national views of the Member states out of the public's eye, letting the citizens believe that decision-making at the EU level is running smoothly, that there is no reluctance and that there are no problems to reach a decision.⁴⁸

Furthermore, as stated above, another advantage of decision-making by consensus is that representatives will often vote 'Yes' even if they are not completely in favour of what is being voted upon. A remarkable data analysis was conducted, showing that some of the representatives should have voted negatively more often than others, but still vote positively. For example it was revealed that Austria, Germany, Finland, Denmark, Sweden and Austria act upon their preference much fewer times than Greece, Spain or Portugal.⁴⁹ The most stringent case is Ireland, which according to the data opposed about 1/4 of the directives but never made note of a formal documentation at the concluding voting stage. This shows that, even where countries might oppose a directive they will still in the end often vote 'Yes'.⁵⁰ This is facilitated by the work that COREPERS do, because they prepare the work so extensively beforehand, that much of the negotiating will be done before the proposal reaches the ministers. Since each of the bodies of the COREPER is also made up of representatives of the Member States, they will be able to start negotiations for their ministers previous to tabling the proposal. Another confirmatory indicator is that 70-80 percent of the proposals prepared by COREPER will fall under the A category, meaning that no more discussion is required.⁵¹

In general, all governments are therefore likely to vote 'Yes'.⁵² However, there remain areas where consensus can simply not be reached. These areas are those that have created the most controversy in the European Union over the years, they have been identified as being for example the internal market, agriculture, and fisheries.⁵³ As stated in Heisenberg's (2005) Article: 'to overcome reservations in some quarters there is only one solution: put the matter to the vote' (Prodi 2004).⁵⁴ Therefore decision-making by consensus does not always work and recourse will be made to QMV.

On the other hand consensus impedes many aspects of democratic decision-making, mainly because of the element of secrecy and because of a lack of transparency. This element of secrecy could be surpassed by the fact that abstentions and negative votes can be made public: in some of the Member States the ministers are obliged to make their disagreement public.⁵⁵ However, this is not required under EU law and often it is also not done.⁵⁶ Since negotiations go on until consensus has been reached, this signifies that voting outcomes show only a little proportion of the complete decision, leaving a big part of the information unknown.

When looking at the factors which might influence a Council Member to abstain or to cast a negative vote, as analysed above, we see that there is a very clear indication that decision-making by consensus is much more beneficial to the large Member States. This is shown by the fact that small Member States tend to vote less against the majority than big Member States and that those countries which contribute less to the budget (most likely smaller

⁴⁷ Heisenberg, 44 European Journal of Political Research (2005), p. 82.

⁴⁸ *Ibid*, p. 83.

⁴⁹ Høyland, Wøien Hansen, 'Voting in the Consensual Council of Ministers', p.11, available at <<http://www.jhubc.it/ecpr-porto/virtualpaperroom/023.pdf>> (last visited 5 December 2012).

⁵⁰ *Ibid*, p.12.

⁵¹ , EU Law: Text, Cases and Materials, p. 44.

⁵² Høyland, Wøien Hansen, 'Voting in the Consensual Council of Ministers', p.12.

⁵³ *Ibid*, p.12.

⁵⁴ Heisenberg, 44 European Journal of Political Research (2005), p. 82.

⁵⁵ Novak, 'The Opacity of Consensus, Decision-making at the Council of the European Union', p. 9.

⁵⁶ Heisenberg, 44 European Journal of Political Research (2005), p. 83.

Member States) will also be less likely to oppose the majority. Consequently, smaller Member States lack the incentive to not follow the larger Member States.

10. Conclusion

Decision-making by consensus has over decades been a highly effective method for the Council to adopt legislative acts. Being part of a hidden opposing minority seems to be a price that many Member States are willing to pay. The reason for this behaviour is the decision-making process efficiency and that it is not revealed that they are one of the defeated countries. This shows that decision-making by consensus can be used as a political tool.

Even though one cannot say that decision making of the Council is not public, the public element lacks transparency. This is because the data that are revealed only show an apparent unanimity but does not tell us which countries opposed or abstained from voting. Some Member States tried to overcome this lack of transparency by introducing a rule in their national law, which prescribes that if their representative opposes or abstains from the measure, this should be made public. However, as noted above, this is not required under EU law and therefore many countries do not have this rule in place. It would be intriguing to see whether decision-making by consensus would persevere if the EU would rule this disclosure mandatory. It would seem intuitive that if this were to be done, the Council of Ministers could very well switch back to simply voting by QMV. This indicates that not being defeated publicly is one of the main reasons why most decisions are made by consensus.

Furthermore, even under the new rules for QMV that will enter into force on the 1st of November 2014, latest in 2017, it is very unlikely that decision-making by consensus will be given up. This is because under the new rules, bigger Member States will have more difficulty to reach a qualified majority as compared to the old rules. As we have seen in discussing trends in the voting data, consensus is in the end much more beneficial for big Member States than for small ones, so why should they switch back to formal decision-making which would make it more strenuous for them to reach a majority.

It can be concluded that the biggest advantage of consensus is that it is extremely efficient. However, because of the lack of transparency and the element of secrecy, it cannot be argued that it is entirely flawless. It remains to be seen whether in the future efficiency can be combined with more transparency.

THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS: ALLIES OR ENEMIES?

Charlotte Mol

1. Introduction

Within Europe today there are two supranational courts which consider fundamental rights. The European Court of Human Rights,¹ set up in 1959, located in Strasbourg. As the name indicates this has always been the foremost human rights court based on the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.² In Luxembourg, the European Court of Justice, today known as the Court of Justice of the European Union,³ was founded in order to interpret and ensure the correct application of European Community/Union law. The institutions regulating the courts have always considered if and how a relationship between the two could and should exist. In reality the two courts have themselves slowly built a relationship through the cases adjudicated by them. The question remains how the courts have done so and whether the legislative changes imposed by the Lisbon Treaty have had an impact. Looking back and looking forward, can we say that the two courts have been allies or that their relationship is instead characterised by animosity? In order to successfully determine the relationship between the court in Luxembourg and the court in Strasbourg, their past relationship, pre-Lisbon, must first be considered, followed by an analysis of the post-Lisbon situation. Seeing how the case law of the two courts has slowly brought them together combined with an understanding of the Lisbon Treaty consequences in this area, will illustrate the type of relationship that exists today.

2. Pre-Lisbon Situation

In order to successfully consider the relationship between the two courts their history is of crucial importance. Although the Court now deems fundamental rights of extreme importance, for the first 17 years it never even considered them.

Why was it that the ECJ from 1959 in the *Stork* case⁴ until 1969 in the *Stauder* case⁵ refused to consider fundamental rights? The main consideration of the Court was that they did not have the competence to consider fundamental rights, as was stated in the *Sgarlata* case.⁶ In the *Geitling* case⁷ together with the *Stork* case the Court refused to consider fundamental rights since these were not protected by Community law. The Court and the European Communities at that time focused solely on market based aspects since the Rome Treaties of 1957 were silent regarding human rights; de Búrca argues that this occurred because the drafters were afraid of another failure similar to the European Defence Community and the European Political Community⁸ treaties, hence all political issues were left out.⁹ This was an

¹ From now on referred to as the ECtHR.

² From now on referred to as the Convention.

³ These two will from now on be referred to as the Court, and in specific circumstances as the ECJ and CJEU.

⁴ Case 1/58 *Stork v High Authority* [1959] ECR 17, para. 4.

⁵ Case 26/69 *Stauder v City of Ulm* [1969] ECR 419.

⁶ Case 40/64 *Sgarlata v Commission of the EEC* [1965] ECR 215.

⁷ Cases 36-38/59 & 40/59 *Geitling, Präsident, Mausegatt, and Nold v High Authority* [1960] ECR 423.

⁸ From now on referred to as EPC.

interesting development, because during the drafting of the EPC in 1952 human rights protection played a key role. The Comité d'études pour la Constitution Européenne, a group of lawyers and pro-integration elitists, created the first draft articles wherein fundamental freedoms were to be one of the aims of the Community. Making the Community a principal in the protection of human rights and interestingly naming the ECHR as the source for these rights.¹⁰ The Ad Hoc Assembly continued with the drafting and was a very different group than the Comité as it consisted of politicians. However they also focused on human rights, even considering a possible accession to the Convention and providing an individual right of action to challenge Community constitutions for violations of the Convention.¹¹ The protection the Assembly included in the Draft goes beyond what is currently protected through the Lisbon Treaty. One could say that if the EPC Treaty had succeeded the current discussion would not have occurred since it is evident that the drafters aimed for a very close and warm relationship between the Convention and the EEC.

The *Stauder* case was the first time the ECJ declared fundamental rights to be a general principle of Union law,¹² but the Court did not identify these rights until *Internationale Handelsgesellschaft* where the rights appeared to be those which were common to the constitutional traditions of the member states.¹³ The ECJ first mentioned the Convention in 1974 in the *Nold* case, where the Court specifically included that international treaties to which the member states are signatories, such as the Convention, should also be considered as a basis for fundamental rights.¹⁴ The *Nold* case is of immense importance as it is the starting point of the use of the Convention as a human rights standard within the European Communities, a positive development towards the inclusion of the ECtHR.¹⁵ A year later in the *Rutili* case the Court actually invoked various Convention articles, using it as a guideline.¹⁶ Since then it has employed the Convention in its cases, increasing the scope in the case of *Wachauf* where it held that member states must, when implementing Community law, observe fundamental rights.¹⁷

An important aspect of the Convention is that it is considered to be a 'living instrument'¹⁸ because the ECtHR continues to further interpret, and at times reinterpret, the articles. The *Baustahlgewebe* case was therefore a significant advance towards collaboration between the

⁹ Búrca, 'The Road not Taken: the European Union as a Global Human Rights Actor', 105 *The American Journal of International Law* 4 (2011), p. 665.

¹⁰ *Ibid* 655-658.

¹¹ *Ibid* 658-664.

¹² *Stauder*, para. 7.

¹³ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4 and in Morano-Foadi and Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights.' 17 *European Law Review* 5 (2011), 597.

¹⁴ Case 4/73 *J. Nold v Commission of the European Communities* [1974] ECR 491, para. 12.

¹⁵ Rincón-Eizaga, 'Human Rights in the European Union. Conflict between the Luxembourg and the Strasbourg Courts regarding interpretation of Article 8 of the European Convention on Human Rights.' 11 *International Law Review Colombo Derecho Bogotá* (2008), pp. 127-128.

¹⁶ Case 36/75 *R. Rutili v Ministre de l'intérieur* [1975] ECR 1219, para. 32.

¹⁷ Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609 and in Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the growing European Human Rights Acquis.' 43 *Common Market Law Review* (2006), p. 634.

¹⁸ *Tyrer v the United Kingdom*, no. 5856/72, ECHR 1978, para. 31, Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon.' 7 *European Constitutional Law Review* 1 (2011), 81, Morano-Foadi and Andreadakis, 17 *European Law Review* 5 (2011), p. 605 and Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts.' 8 *The Law and Practice of International Courts and Tribunals* 3 (2009), p. 384.

courts, as the Court directly relied on the case law of the ECtHR ‘by analogy,’¹⁹ after having first referenced to the case law two years earlier in *P v S*.²⁰ It strengthened this position in the *Roquette* case where the Court stated that ‘the European Convention on Human Rights has special significance’ and that the case law must be regarded.²¹ This judgment diverged from the judgments in the cases of *Hoechst* and *Orkem* which were criticized because the ECJ gave rulings that were later found to be contrary to the interpretations of the ECtHR.²² The last case of importance prior to the Lisbon Treaty is the *Pupino* case, from 2006, which gives a clear example of how the Court adopted and applied the case law of the ECtHR directly to its member states.²³

Considering the discussed historical evolution of the Court’s use of the Convention and the case law connected to this, it can be seen that after the lack of inclusion of human rights in the Rome Treaties the Court was initially extremely hesitant to consider any form of fundamental rights in their case law. It was not until the 1970’s that the Court warmed up to the idea of fundamental rights. Since then it has taken the lead to incorporate the Convention rights and jurisprudence into the European Communities. It was followed by the European Parliament, Council and Commission in 1977 with the Joint Declaration on the Convention, making clear their attachment to the rights contained within.²⁴ Since 1979,²⁵ the Commission has even proposed accession. The driving force, however, still lay with the Court since the Maastricht Treaty of 1992 and the Amsterdam Treaty of 1997 only added to the Treaty what was already in effect within the Court’s case law.²⁶ It was the Charter of Fundamental Rights of the European Union,²⁷ which was ratified in 2000, that created a the secure text within European Union law, even though it was only given full legal effect by the Lisbon Treaty. Up until the Lisbon Treaty, it clearly had been the Court who had taken the lead as regard fundamental rights, by attaching itself slowly but surely to the protections afforded in the Convention and through considering the case law of the ECtHR. Doing so, it showed that it thinks highly of the Convention and the ECtHR’s interpretation of it.

On the other hand, the ECtHR has also had a case history with the court in Luxembourg, albeit a less extensive one. In the 1978 case of *Confédération Française Démocratique du Travail* the Commission²⁸ declared applications against the Communities to be inadmissible.²⁹ The Commission in the case of *Etienne Tête v France* showed that in principle applicants can bring a case against a State concerning national measures which give effect to Community

¹⁹ Case 185/95 *Baustahlgewebe v Commission of the European Communities* [1998] ECR I-08417, para. 29 and in Morano-Foadi and Andreadakis, ‘The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: the ECJ and ECtHR Jurisprudence.’ 22 *The European Journal of International Law* 4 (2011), 1073

²⁰ Case 13/94 *P v S* and Cornwall County Council [1996] ECR I-02143

²¹ Case 94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*, and Commission of the European Communities [2002] ECR I-109011, para. 23 & 29

²² The two cases concerned Art. 6 and Art. 8 of the ECHR. Cases 46/87 & 227/88 *Hoechst v Commission of the European Communities* [1989] ECR 2859 and Case 374/87 *Orkem v Commission of the European Communities* [1989] ECR 3283. See also Weiß, 7 *European Constitutional Law Review* 1 (2011), pp. 77-79.

²³ Case 105/03 *Pupino* [2005] ECR I-05285, Douglas-Scott, 43 *Common Market Law Review* (2006), p. 662, and Morano-Foadi and Andreadakis, 22 *The European Journal of International Law* 4 (2011), p. 1073

²⁴ Joint Declaration by the European Parliament, Council and the Commission concerning the protection of fundamental rights and the ECHR (Luxembourg, 5 April 1977) OJEC, No C 103 (s.1)

²⁵ Commission Memorandum, Bulletin of the European Communities, Supplement 2/79

²⁶ Rincón-Eizaga, 11 *International Law Review Colombo Derecho Bogotá* (2008), pp. 131-133.

²⁷ From now on referred to as the Charter.

²⁸ Note that this is the European Commission on Human Rights and not the Commission within the European Union.

²⁹ *Confédération Française Démocratique du Travail v the European Communities* alternatively: their Member States a) jointly and b) severally (dec.), no.8030/77, ECHR 1978, para. 3.

law,³⁰ and the Court continued this line of thought in *Cantoni v France*, so long as the State has a wide margin of appreciation in the application of Community law.³¹ In *Matthews v the United Kingdom* the Court additionally made States responsible if there is a violation in a European treaty when the State in question was involved in its adoption.³² These judgments are all reasonable; the question that remained was whether national measures which give effect to Community law with a narrow or no margin of appreciation as well as fundamental rights provided by the Community could be tested by the ECtHR. The first question was answered by the Commission in *M & Co. v Germany*; it found those applications to be inadmissible as the Community system was found to give equivalent protection to human rights.³³ This position was reaffirmed in the recent *Bosphorus* case, with the ‘presumption of equivalence.’ This means that since the Community law is found to be equivalent, a state, when following the requirements of its membership to the European Community, cannot be found to act against the fundamental rights protected in the Convention, but it did find that the case is admissible.³⁴ The ‘presumption of equivalence’ shows that the ECtHR also has high regard for the Union institutions and feels that the two courts are at an equal wavelength.

3. Post-Lisbon Situation

The Lisbon Treaty has three main consequences for the area of fundamental rights which play a large role in defining the relationship post-Lisbon between the two courts. To start with, art. 6(1) of the TEU now stipulates that the Charter is legally binding by having the same value as the Treaties.³⁵ The effect being that it will have direct effect and primacy regarding domestic law in all Member States within its scope.³⁶ The scope of the binding force is stated in art. 51(1) of the Charter, including its effect on the EU institutions and on Member States when implementing Union law. As one Judge from the Court of Justice expressed, the Charter ‘has become hard law, but within its own parameters.’³⁷ There remains a question of interpretation of art. 51(1) regarding these parameters, since the CJEU in its case law prior to Lisbon held that the Member States had to respect fundamental rights also when trying to diverge from Union law or when maintaining that the question falls outside Union law. Would the Charter limit this?³⁸ The question hasn’t been answered by the Court, but the Official Explanations state that it applies when Member States act ‘in the scope of Union law.’³⁹ It will be up to the CJEU to clarify this aspect, all one can say is that the Court has referred to the legal status of the Charter for the first time in the *Küçükdeveci* case⁴⁰ and on a regular basis ever since.⁴¹ The effect on the relationship between the courts being that the CJEU now commences by considering the Charter, instead of starting with the Convention,

³⁰ *Etienne Tête v France* (dec.), no. 11123/84, ECHR 1997, para. 3.

³¹ *Cantoni v France* [GC], no. 17862/91, ECHR 1996-V.

³² Also counts for other Treaties. *Matthews v the United Kingdom* [GC], no. 24833/94, ECHR 1999-I.

³³ *M. & Co. v Germany* (dec.), no. 13258/87, ECHR 1990.

³⁴ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC], no. 45036/98, ECHR 2005-VI and Lock, 8 *The Law and Practice of International Courts and Tribunals* 3 (2009), pp 377-379.

³⁵ *Ibid.*, p. 381.

³⁶ Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon.’ 11 *Human Rights Law Review* 4 (2011), p. 656.

³⁷ Morano-Foadi and Andreadakis, 17 *European Law Review* 5 (2011), p. 600.

³⁸ García, ‘The General Provisions of the Charter of Fundamental Rights of the European Union.’ 8 *European Law Journal* 4 (2002), p. 495.

³⁹ Explanations relating to the Charter of Fundamental Rights, OJ 2007, C 303/32 and Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), pp. 652-653.

⁴⁰ Case 555/07 *S. Küçükdeveci v Swedex GmbH & Co.* [2010] ECR I-00365, para. 22

⁴¹ Morano-Foadi and Andreadakis, 17 *European Law Review* 5 (2011), p. 598.

only subsequently considering the Convention.⁴² This doesn't mean that the relationship has worsened; it simply gives the Union its own text to hold on to.

The second consequence is that art. 6(2) of the TEU now obliges the Union to accede to the ECHR.⁴³ In order to do so, the Union requires a unanimous Council decision, consent of the European Parliament and ratification by the Member States.⁴⁴ The advantages are clear, as Commissioner Reding states 'the accession of the EU to the Convention will complete the EU system of protecting fundamental rights'⁴⁵ and 'will ensure that the case-law of both courts – the Court in Strasbourg and our Court in Luxembourg – evolves in step.'⁴⁶ The latter quote shows how accession will minimize the danger of having conflicting interpretations from the two courts,⁴⁷ a step forward to an even closer cooperation.

While the advantages might be straightforward, the conditions to accession are not. The main problem is regarding Union law autonomy that must be preserved. It is this area that creates a small clash between the two courts, mainly on the side of the CJEU. There are two facets involved. Firstly, the CJEU does not wish for any other court to be able to assess the distribution of competences between the Union and the Member States.⁴⁸ The proposed solution was the 'co-respondent' mechanism, allowing the Union or a Member State to join the proceedings as a 'co-respondent'; any violation found would then be binding on both the applicant and the 'co-respondent' allowing the Union to decide who has to repair the damage of the victim.⁴⁹ However this solution was initially rejected since it would not give the ECtHR enough control over the proceedings.⁵⁰ Nonetheless in the final draft Accession Agreement text a modified version is included, allowing the 'co-respondent' mechanism to be used in certain cases.⁵¹ The second aspect involved regarding the Union Autonomy concerns the exclusive jurisdiction of the CJEU in regard to the interpretation and application of Union law derived from art. 19(1) TEU. The problem here is that the ECJ held that the Union did not have the competence to join international agreements which would allow another court to make a binding decision on how Union law should be interpreted or applied.⁵² However, the Convention has the rule of the exhaustion of domestic remedies,⁵³ which means that the parties are required to exercise their right of appeal within the Union jurisdiction before

⁴² *Ibid*, p. 601.

⁴³ Barents, 'The Court of Justice after the Treaty of Lisbon,' 47 *Common Market Law Review* (2010), 722.

⁴⁴ Art. 218(6) and (8) TFEU, Barents, 47 *Common Market Law Review* (2010), 722 and Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), p. 661.

⁴⁵ V. Reding, 'The EU's Accession to the European Convention on Human Rights: Towards a Stronger and More Coherent Protection of Human Rights in Europe', Speech, Brussels March 2010, available at <http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf> (last visited 16 March 2013).

⁴⁶ V. Reding, 'Towards a European Area of Fundamental Rights: the EU's Charter of Fundamental Rights and Accession to the European Convention of Human Rights', Speech, Interlaken February 2010, available at http://europa.eu/rapid/press-release_SPEECH-10-33_en.htm?locale=en (last visited 16 March 2013)

⁴⁷ Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), pp. 658-659.

⁴⁸ *Opinion 1/91* [1991] ECR I-6079 and Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms,' 48 *Common Market Law Review* (2011), 1012.

⁴⁹ Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), 664 and Jacqué, 48 *Common Market Law Review* (2011), p. 1014.

⁵⁰ Jacqué, 48 *Common Market Law Review* (2011), p. 1015.

⁵¹ Art. 3 Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, July 2011, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/CDDH-UE_2011_16_final_en.pdf (last visited 16 March 2013) and Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), 665.

⁵² *Opinion 1/91* and *Opinion 1/00* [2002] ECR I-3493.

⁵³ Art. 34 ECHR.

heading to the ECtHR.⁵⁴ As has been established in ECtHR case law the Strasbourg court does not want to take the place of national authorities by interpreting and applying the domestic law, also as concerns international treaties.⁵⁵ This makes it more likely that the ECtHR will consider the CJEU's interpretation when adjudicating. The CJEU has exemplified this aspect, saying that the possibility of the ECtHR to consider an act without a prior CJEU ruling should be avoided.⁵⁶ An additional solution has been proposed by Jacqu  who argues that in the cases with a divergence between a Union act and the Convention, a strengthened preliminary reference procedure should exist. Additionally the national courts should be compelled to conduct a preliminary procedure in such cases.⁵⁷ This would ensure that the autonomy of the CJEU in its interpretation of Union law is not lost when accession occurs. It is still to be seen how the two courts will solve these questions in the final Accession agreement.

The last consequence of the Lisbon Treaty is that the Convention is now no longer simply a guideline, but the minimum standard for the corresponding rights in the Charter, thereby substantially incorporating the Convention rights into the Charter.⁵⁸ Article 52(3) of the Charter provides for this; making the Union indirectly bound by the Convention through the legal status of the Charter.⁵⁹ The aim of the inclusion of this minimum standard is to ensure consistency between the two courts.⁶⁰ However, should the case law then not also be included in the minimum standard to ensure uniformity? When looking at the wording of the art. 52(3) there is no reference to ECtHR case law,⁶¹ although Wei  argues that the teleology of the article justifies the binding force of the case law on the Convention rights.⁶² It is the Official Explanation which offers an insight as it unambiguously states that case law should be considered to determine the meaning and the scope of the Convention rights.⁶³ The latter was also held by the CJEU in the case of *J. McB. v L.E.*⁶⁴ By having the Court consider the jurisprudence of the ECtHR there is a strong incentive for the two courts to maintain contact,⁶⁵ providing for a harmonious relationship. From the aforementioned it is evident that the Convention will have increased influence within the Member States, not only through accession but due to the Charter.⁶⁶

⁵⁴ Jacqu , 48 *Common Market Law Review* (2011), 1017 and Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), p. 663.

⁵⁵ See *W. v The Netherlands* (dec.), no. 20689/08, ECHR, in The Law part B.

⁵⁶ Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2010, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf (last visited 16 March 2013).

⁵⁷ Jacqu , 48 *Common Market Law Review* (2011), p. 1019.

⁵⁸ Peers, 'Taking Rights Away? Limitations and Derogations', in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights*, (Hart, 2004), 171, and Wei , 7 *European Constitutional Law Review* 1 (2011), p. 70.

⁵⁹ Lock, 8 *The Law and Practice of International Courts and Tribunals* 3 (2009), p. 382.

⁶⁰ Wei , 7 *European Constitutional Law Review* 1 (2011), p. 69.

⁶¹ Lock, 8 *The Law and Practice of International Courts and Tribunals* 3 (2009), p. 384 and Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), p. 655.

⁶² Wei , 7 *European Constitutional Law Review* 1 (2011), 81 and see also Art. 48(1) ECHR.

⁶³ Explanations relating to the Charter of Fundamental Rights, OJ 2007, C 303/33 and Lock, 8 *The Law and Practice of International Courts and Tribunals* 3 (2009), p. 384.

⁶⁴ Case 400/10 *J. McB. v L.E.* [2010] ECHR I-08965, para. 53 and Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), p. 655.

⁶⁵ Douglas-Scott, 11 *Human Rights Law Review* 4 (2011), p. 655.

⁶⁶ Garc a, 8 *European Law Journal* 4 (2002), p. 511.

4. Conclusion

In view of the pre-Lisbon situation it can be said that the two Courts had a rough start, with the ECJ declining to consider fundamental rights. Yet once it did, it held the ECtHR in high regard, slowly but surely incorporating the Convention rights and the ECtHR case law within the Community system. While the ECtHR also refrained from admitting Community cases until recently in the *Bosphorus* case, it has deliberated on Union related cases and has since 1990 accepted that the court in Luxembourg affords an equal protection of fundamental rights. In the pre-Lisbon situation it cannot be said that the courts had any animosities, there was clearly a relationship of respect between the two.

The Lisbon Treaty has had several consequences within the area of fundamental rights, including the legal effect of the Charter, the requirement of accession to the Convention and elevating the Convention to the minimum standard, including the ECtHR's case law. Making the Charter legally binding didn't have a direct effect on the relationship, but indirectly allowed for the Convention rights that were transposed to be of higher value within the Union, while at the same time making the CJEU judges now stray their primary focus from the Convention to the Charter. Accession will definitely have an impact on the relationship, the declaration attached to the Lisbon Treaty shows the aim of closer cooperation; 'the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.'⁶⁷ Then again it is yet to be seen how certain problems regarding the autonomy of the CJEU will be solved. Here is where a small animosity can be said to exist, as the Court is concerned about losing its monopoly over the interpretation and application of Union law as well as the distribution of competences with the Member States. However, academics seem to be less concerned as they propose various solutions which could be employed within the Accession agreement to ensure both the courts of their powers. At the same time it appears that, from considering its cautious case law, the ECtHR is not aiming to reduce the power of the CJEU, but solely to protect the fundamental rights in the Convention. Hence, one can say that accession will strengthen the cooperation between the courts, provided that solutions to preserve autonomy are included. Lastly, the new minimum standard of the Convention and the attached case law allows for further dialogue between the courts and a uniform application of fundamental rights; a positive recognition of the close and friendly relationship that the two courts have.

All things considered, one can say that the two courts have never been enemies, they have simply been cautious at the start and slowly developed towards the cooperative relationship they have today. Although the Lisbon Treaty will strengthen their relationship, especially upon the Union's accession to the Convention, it cannot be forgotten that the driving force of the two courts has allowed for this to occur. Especially the Luxembourg court has embraced the Convention and its court. Without its judicial activism regarding fundamental rights we would not be where we are today.

⁶⁷ Declaration on Article 6(2) of the Treaty on European Union [2010] OJ C 83/337.

THE RELATIONSHIP BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS: COMPLICATIONS OF THE ACCESSION OF THE EU TO THE ECHR

Rebecca Wörner

1. Introduction

Shortly after the Second World War the Council of Europe was created, which drafted the European Convention of Human Rights to secure a minimum standard of basic rights.¹ Parallel to the establishment of the Council of Europe, the European Coal and Steel Community (ECSC), the corner stone of what we know as today's European Union, was brought into being.² Both institutions created their own Courts, the European Court of Human Rights (hereinafter referred to as the "ECtHR") in Strasbourg and the Court of Justice of the European Union (CJEU) in Luxembourg respectively.³ Even though both courts are on top of the hierarchy within their respective legal orders, there have barely been signs of rivalry. On the contrary- as history shows, there has been comity between the two Courts as will be discussed in further detail. The question at the moment is whether the fact that the EU will accede to the ECHR will change the relationship between the two courts. After all, by virtue of the accession, the CJEU will be subordinated to the ECtHR. In this research paper, the factors, which have shaped the co-existence of the Strasbourg and Luxembourg Courts, will be considered. Subsequently, complications of the accession will be discussed in further detail.

2. One Hand Washes the Other and Both Wash the Face

What may have contributed to this friendly relationship, are the main objectives of the founding fathers of the two Courts. The CJEU is primarily concerned with its role as an integrative agent, focussing on (the economic aspect of) European integration.⁴ ⁵The role of the ECtHR, on the other hand, is more about maintaining a minimum standard of human rights by reviewing legal acts on the conformity with the Convention.⁶ Moreover, the CJEU has shown that it is willing to adhere to the case law of the ECtHR⁷. Before the CJEU made reference to the case law of the ECtHR, it "imported" the European Convention for the protection of Human Rights (ECHR) into the sphere of European Union Law due to the fact that it lacked reference to own legal sources concerning human rights.⁸ In the 1960's, when the CJEU increasingly was being confronted with questions in regard to

¹ M. Cuthbert, *European Union Law in a Nutshell* (Sweet&Maxwell, 2006), p. 115.

² M. Cuthbert, *European Union Law*, p. 114.

³ L. Arévalo, 'Adjudication of International Disputes in Europe: The Role of the European Court of Justice and the European Court of Human Rights'

The European Union Center at the University of Illinois working papers volume 6, no 1(2006), p. 4.

⁴ G. De Búrca & J. Weiler, *The European Court of Justice*, (Oxford University Press, 2001), p. 56.

⁵ Jeffrey Cohen: "the Court has done more to advance the cause of European unity – the cause of federalization of Europe – than any other Community institution".

⁶ M. Cuthbert, *European Union Law*, p. 114.

⁷ T. Lock, 'Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order', *Law and Governance in Europe Working Paper Series* (2011), pp. 15-20.

⁸ X. Groussot et al, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011', 218 *Fondation Robert Schuman European Issues* (2011), p. 1, 2.

human rights, it began to protect these rights. One decennium later, with the added pressure by several Constitutional Courts of the Member States (which claimed that rights were not sufficiently protected and therefore did not want to acknowledge the primacy of European law over their national legislation)⁹ ¹⁰ it started to depend on the ECHR and later citing specific articles thereof ¹¹. It then became an important means to enforce the primacy of Union Law.¹² The first reference to the ECHR was made in the *Nold* case. Later, the CJEU directly referred to the case law of the ECtHR, which illustrates its respect of their judgments.¹³ ¹⁴ The ECHR gradually turned into the minimum standard for safeguarding human rights within in the European Union. Clear evidence for this can be found in the *Schmidberger* case of 2003 in which the CJEU considered the right of freedom of expression, as protected under the ECHR, more important than the freedom of movement of goods, which in turn can be considered as one of the core interests protected in the European Union treaties.¹⁵ This exemplifies the desire of the CJEU to foster their cooperation with the ECtHR in relation to human rights.

However, this does not necessarily mean that the CJEU considers itself bound by the case law of the ECtHR. In *Kadi*, the court pointed out that it considered the Convention and the derived case law thereof merely as a source of inspiration.

There have been cases in which the opinions of the two Courts were diverging. Notably Article 6 and 8 of the ECHR were in the centre of attention in this regard.

In *Hoechst*, the CJEU held that business premises did not fall under the scope of protection as provided by Article 8 ECHR and claimed that there was no ECtHR case law stating otherwise, whereas the ECtHR had ruled six months previous to that in the *Chappell* case that Article 8 also was applicable in cases involving business premises.¹⁶ Later in the case *Roquette Freres*, when the CJEU was asked to reverse its ruling in *Hoechst*, it indeed extended the scope of Article 8 ECHR to include business premises.¹⁷

Therefore, it can be concluded that even though the CJEU expressly stated that it merely sees the Convention as a source of inspiration, the Court is rather wary not to contradict the Convention or the decisions of the ECtHR. This may be due to the fact that it wants to avert conflicting judgments where Member States of the EU would have to “choose” between abiding EU law and the ECHR.¹⁸

Moreover it can be argued that the Court of Justice has found a rather effective tool to enforce the primacy principle of EU law when relying on the Convention. By making reference to the ECHR, the ECJ builds a shield against possible attacks by Member States.¹⁹

⁹ Ibid.

¹⁰ Also see case law of *Internationale Handelsgesellschaft* [1974] Case 11–70 (“*Solange I*”) and *Re Wuenche Handelsgesellschaft*, BVerfG [1987] (“*Solange II*”).

¹¹ Case 36-75. *Roland Rutili v Ministre de l’intérieur*. [1975].

¹² J. Christoffersen et al., *The European Court of Human Rights between Law and Politics* (Oxford University Press, Oxford 2011), p. 164-167.

¹³ Ibid

¹⁴ T. Pavone, ‘The Past and Future Relationship between the European Court of Justice and the European Court of Human Rights: A functional Analysis’, *Inter-university Consortium for Political and Social Research (ICPSR) at the University of Michigan* (2012), p. 21.

¹⁵ J. Christoffersen et al., *The European Court of Human Rights between Law and Politics*, p. 163.

¹⁶ L. Rincón-Eizaga, ‘Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts regarding the interpretation of Article 8 of the European Convention on Human Rights’, *11 International Law Review Boletín Mexicano de Derecho Comparado*, p. 137.

¹⁷ Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 29.

¹⁸ L. Rincón-Eizaga, ‘Human Rights in the European Union’, *11 International Law Review Boletín Mexicano de Derecho Comparado*, (2008), pp. 127, 128.

¹⁹ J. Christoffersen et al., *The European Court of Human Rights between Law and Politics*, p. 174.

Important rulings regarding the attitude of the ECtHR towards the Union can be found in the case law of *Matthews v. U.K.* and *Bosphorus*. In *Matthews*, the Court made a decisive move towards extending its own power to (indirectly) review EU law.²⁰

In *Bosphorus*, the ECtHR again asserted this power, but in doing so, it ruled: “the protection of human rights in EU law is equivalent to the one under the ECHR”²¹. In line with this reasoning, the Court stated that where Member States did not enjoy discretion in the implementation of secondary legislation of the EU, their actions are assumed to be in accordance with the Convention. The test derived from this case was not whether a Member State of the EU actually breached the ECHR but if the protection of the Convention rights was manifestly deficient.²² This major decision, the ECtHR put the CJEU in a higher position than national courts, as, in other words, the Strasbourg court would go so far as to refrain from claiming jurisdiction in cases where a Member State did not enjoy discretion when implementing certain Union Law.²³

It seems that the Courts have taken their relations to such a level that they do not get into each other’s way, where the CJEU follows the ECtHR’s case law in a rather submissive manner and the latter will only intervene in cases when absolutely necessary. It may, however, be the case that once the EU’s accession is completed, their relationship will change. This will be considered in the section below.

3. *The Impact of the Accession on the Courts’ Relationship*

The idea that the EU should become a party to the ECHR is not new. It was proposed in 1979 and in 1990.²⁴ However, when officially proposed to the CJEU, the Court held in its Opinion 2/94 that such accession was not possible, due to the fact that the law did not include any legal basis for such action.²⁵ This matter was finally settled by the Lisbon Treaty. Article 6(2) TEU was amended and now states that the EU ‘shall accede’ to the ECHR, which turned the idea of accession into a legal obligation.²⁶ In 2010, Article 59(2) of the ECHR came into force by the amendment of Protocol No. 14 to the ECHR, which enabled the EU to accede.²⁷

In spite of the fact that the EU already provides for a solid system of human rights protection (after all, the Charter already guarantees a safety net), the formal accession of the EU to the ECHR will effectuate two major advantages:

Firstly, it closes a legal gap where the ECtHR previously lacked jurisdiction in certain cases by virtue of *ratione personae* as well as *ratione materiae* in cases where EU Member States have transferred their answerability under the Convention to the Union.²⁸

²⁰ K. Kuhnert ‘Bosphorus: Double standards in European human rights protection?’ 2 *Utrecht Law review*, 2 (2006), p. 182.

²¹ Case C-84/95 *Bosphorus Airways v. Ireland*, [2005].

²² F. Schorkopf, ‘The Judgment of the European Court of Human Rights in the Case of *Bosphorus Hava Yolları Turizm v Ireland*’, 6 *German Law Journal* (2011), p. 8.

²³ Chalmers et al, *European Union Law: Cases and Materials* (Cambridge University Press, Oxford 2010), p. 1259.

²⁴ A. Limante, ‘Draft Agreement on the Accession of the EU to the ECHR: fitting Cinderella’s shoes for Gulliver’, King’s College London Law Review Blog Series (2012).

²⁵ Ibid.

²⁶ P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, Oxford 2011), p. 407.

²⁷ In this article it is stated, as amended by Protocols No. 11 and 14, “The European Union may accede to this Convention.”

²⁸ J. Králová, ‘Comments on the draft Agreement on the Accession of the EU to the ECHR’, 08 *Czech yearbook of public and private international law* (2011), p. 8.

Secondly, the EU would be subjected to legal review by an external body, which would mean a boost of credibility and legitimacy on the international stage.²⁹

Even though the EU could have acceded unilaterally, a more complicated way of accession was chosen in form of an Accession Agreement.³⁰ The Commission, which was represented by a negotiating mandate, initiated negotiations over the accession with the Council of Europe in 2010.³¹ To that purpose, the Steering Committee for Human Rights established the informal working group CDDH-UE. In June 2011, the CDDH-UE presented the draft text of the Accession Agreement. Before the Agreement can enter into force, the Agreement needs to be approved by the institutions of the Council of Europe and by the Union. Also, it is subjected to the ratification by all of the Contracting Parties to the Convention.³² Until then, the negotiations proceed, as several unresolved aspects will have to be discussed and taken into consideration in the negotiation process. For the EU, the most significant hurdle is the concern about the preservation of the autonomous character of its legal order. This is a major point of discussion in the negotiations at the moment.³³ Other specific issues are the claims to jurisdiction of both courts, the exhaustion rule set forth in the ECHR and the future of the *Bosphorus* presumption. Certain mechanisms are proposed to overcome these obstacles and the way they are going to be implemented may significantly define the relationship between the courts, as will be discussed below.

4. *The Exclusive Jurisdiction of the CJEU versus the Jurisdiction of the ECtHR*

As established above, the relationship between the two courts at the moment is rather friendly, yet unresolved. A possible ground for future annoyance may be that the Courts' claims to jurisdiction are prone to clash under certain circumstances.

In the CJEU's Opinion 1/91 it was stated that its exclusive jurisdiction did not only flow from the Treaties (at that point of time the concerning provisions were to be found in Article 292 of the EC Treaty) but is at the core of the Union's legal system.³⁴ The CJEU's claim of exclusive jurisdiction concerns a rather wide range of legal disputes as was shown in the *Mox Plant* case.³⁵

According to earlier case law of the CJEU³⁶, provisions included in agreements made by the Union automatically fall under the scope of Union law. Once the accession is completed, the ECHR will therefore be integral part of Union law. Consequently, the CJEU will have jurisdiction to interpret the ECHR.³⁷ This claim to jurisdiction, however, is rather unlikely to harm the harmony between the courts. What arguably may give cause to concern is the fact that the ECtHR enjoys exclusive jurisdiction in inter-state disputes according to Article 55 ECHR as well as jurisdiction over disputes between parties to the Convention under Article 33. After the accession, disputes between the EU and Member States could therefore be in principle be settled by the ECtHR. This goes directly against the CJEU's claim to exclusive jurisdiction over matters that fall under EU law (see Art. 344 of the TFEU).^{38 39} However, the

²⁹ P. Craig & G. De Búrca, (Oxford University Press, Oxford 2011), p. 409.

³⁰ T. Lock, Law and Governance in Europe Working Paper Series (2011), pp. 17-20.

³¹ P. Craig & G. De Búrca, (Oxford University Press, Oxford 2011), p. 400.

³² Jana Králová, 08 Czech yearbook of public and private international law (2011), p. 8.

³³ T. Lock, Law and Governance in Europe Working Paper Series (2011), pp. 16-18.

³⁴ Opinion 1/91 [1991] ECR I-6079

³⁵ T. Lock, Law and Governance in Europe Working Paper Series (2011), p. 17.

³⁶ Case 96/71 Haegemann v. Commission [1972]

³⁷ T. Lock, Law and Governance in Europe Working Paper Series (2011), p. 15.

³⁸ Also see Opinion no. 1/91 where the CJEU held that the EU had no competence to permit another Court to interpret the Treaties in a way, which would be internally binding for the Union.

ECtHR will merely be concerned with the question whether the EU has acted in conformity with the obligations set forth under the ECHR. Reviewing for incompatibilities with the Convention does not imply that the Strasbourg Court will be given the competence to interpret Union law in a binding fashion. Neither is it the case that the ECtHR has the power to invalidate EU provisions. The Strasbourg Court will base its decisions on the rulings of the CJEU. Moreover, Article 5 of the Draft Agreement stipulates that proceedings before the CJEU shall not be understood as procedures or settlement within the meaning of Articles 35 or 55 ECHR. To that end, a possible conflict of the two Courts claiming jurisdiction on basis of Article 55 ECHR and Article 344 TFEU respectively is being avoided. Their relationship in this matter will stay intact and any possible disputes on this issue have consequently been prevented. This matter does therefore not constitute a complication as such.

5. *Preserving the Autonomous Character of the EU's Legal Order*

Accession to the ECHR means that EU acts and omissions will be reviewable by the ECtHR.⁴⁰ At the same time, the EU clearly aims to keep its legal order intact.

For example, the explanatory memorandum to Article 52(3) of the EU Charter of Fundamental Rights, stresses on the fact that whilst complying with the standards set forth in the ECHR, the autonomy of Union law should not be affected.⁴¹ The EU's effort to preserve its autonomy is also reflected in the Draft Agreement where it is stated that the EU's accession requires certain adaptations to the Convention system, among those "adaptations of the procedure before the European Court of Human Rights (...) to take into account the characteristics of the legal order of the EU, in particular the specific relationship between an EU member State's legal order and that of the EU itself"⁴².

In situations where a Member State is claimed to have infringed the ECHR while implementing EU law, the question of which entity should be blamed for the infringement—the EU or the Member State itself will arise.⁴³

Arguably, the discretionary power of the State in question will be the decisive factor in such situations. In case the responsibility lies with the State, it will have to bear the consequences itself. Otherwise, the EU is to be blamed.⁴⁴ The discretionary power of the Member States (and the division of competences between the EU and its Member States) is an internal matter of EU law.

In its Opinion 1/91, the CJEU held that only itself has the exclusive competence to rule on the question of division of powers between the EU and its member states, otherwise the autonomous character of the EU legal order would be put into danger.⁴⁵

A solution to this issue may be provided by a co-respondent mechanism. The Draft Agreement provides for such a mechanism under Article 3, including specific provisions about tests for triggering the mechanism and reasons for providing the mechanism.⁴⁶ This

³⁹ X. Groussot et al, 218 *Fondation Robert Schuman European Issues* (2011), p. 5.

⁴⁰ J. Christoffersen et al., (Oxford University Press, Oxford 2011), p. 164.

⁴¹ P. Craig & G. De Búrca, (Oxford University Press, Oxford 2011), p. 409.

⁴² Paragraph 3, Section I, Draft Agreement

⁴³ Article 1(b) of Protocol No 8 to the Treaties sets forth that the agreement on accession should include the mechanisms necessary to ensure that proceedings by non-member states and individual applications are correctly addressed to the Member States/ or to the Union as appropriate.

⁴⁴ Biondi et al., *EU Law after Lisbon*, (Oxford University Press, Oxford 2012), p. 191.

⁴⁵ *Ibid.*

⁴⁶ Draft agreement of EU accession

would entail that the EU will be given the opportunity to join as a co-respondent in cases before the ECtHR in such situations.⁴⁷

As pointed out earlier in the *Bosphorus* ruling, it became clear that the ECtHR recognized that it was very well possible that the entity enacting a EU act does not have to be the same entity implementing it. A co-respondent mechanism prevents situations where one of the parties (here the drafter of the implemented act) would be declared inadmissible on grounds of *ratione personae*. Via this way, the party would be enabled to join the proceedings.⁴⁸

In cases where the EU joins a Member State as a co-respondent, the judgment by the ECtHR will bind the EU as well as the State. This is necessary in cases where the legislation at issue is of EU nature and only the Union itself would be able to amend it and therefore extinguish the violation. It then would be up to the ECtHR to decide on whether the EU has a valid interest to join as a co-respondent or not.⁴⁹

Introducing a co-respondent mechanism brings about many advantages for future individual applicants as well as to both Courts. Individual applicants will not be put in a situation where they would wrongly hold a Member State responsible where this Member State had no leeway in implementing a certain legal act under Union Law. In such cases, both, the Member State as well as the EU could be held responsible jointly as co-respondents.⁵⁰ For the CJEU the co-respondent mechanism would mean that it could preserve its legal autonomy in this respect as by virtue, the ECtHR would not have to rule on the distribution on competences (i.e. an internal matter within the EU). The introduction of such mechanism is important for the relationship between the courts, as it is an important means to prevent disputes where the EU would claim that its autonomy was violated. This issue is indeed disputed in the negotiation process and forms a complication to the accession.⁵¹

6. *The Exhaustion Rule*

Art. 35(1) ECHR sets forth that the ECtHR may only deal with cases “after all domestic remedies have already been exhausted”. The question was raised whether this pre-requisite was also fulfilled in cases, which were not previously submitted to the CJEU.⁵²

In negotiations in June 2010 with the Council of Europe, it was discussed whether the ECJ should be given the possibility by a special mechanism to intervene before these types of cases are referred to the ECtHR (i.e. prior involvement of the CJEU).⁵³

At the moment of writing, a definite way has yet to be found to precisely organize a prior involvement procedure.

A less drastic implementation of the mechanism would be to provide the ECJ with the ability to comment on issues raised in cases before the ECtHR involving the interpretation or application of EU law.⁵⁴ This is in line with Article 3(6) of the Draft Agreement, in which it is proposed that under certain circumstances the CJEU shall be given the possibility to assess the compatibility of Union Law with the Convention. The CJEU itself is of the opinion that it

⁴⁷ Biondi et al., (Oxford University Press 2012), p. 191.

⁴⁸ J. Králová, 08 Czech yearbook of public and private international law (2011), p. 132.

⁴⁹ X. Groussot et al, 218 Fondation Robert Schuman European Issues (2011), Page 11.

⁵⁰ Ibid.

⁵¹ Biondi et al., (Oxford University Press, Oxford 2012), Page 191.

⁵² Ibid.

⁵³ Draft Council Decision 10568/10.

⁵⁴ Biondi et al., (Oxford University Press 2012), p. 190.

is not acceptable to permit the ECtHR to rule on the compatibility of an EU act without being given the possibility to decide itself whether the act is valid or not.⁵⁵

This opinion illustrates that the CJEU itself is a proponent of the prior involvement mechanism. However, providing for such a mechanism is rather complex.

Firstly, this would lead to a privileged position of the EU in comparison to the other parties to the ECHR, as normal national (constitutional) courts are not always given the chance to review their national acts in regard to the applicant's complaint of a violation.⁵⁶

Secondly, an individual cannot lodge a preliminary reference procedure to the CJEU so therefore such remedy is therefore not directly available to him. Only a court or tribunal of a member state, according to Article 267 TFEU, can request a preliminary reference procedure.⁵⁷ In case an application would be inadmissible where an individual took its case to the highest court but the court did not do a preliminary reference to the CJEU, this would mean that the application would be inadmissible according to the exhaustion rule of the ECHR⁵⁸. It would be very unjust to hold an individual responsible for not exhausting a remedy, which was not directly available.⁵⁹

Thirdly, a prior involvement procedure will make the co-respondent mechanism even more complex.

How such procedure would be implemented in practice and to which extent it would be available may have a profound impact on the relationship between the two courts. If the CJEU were to be granted with a mechanism as such to review acts previous in time to the ECtHR, it would most probably be able to prevent embarrassing situations by sparing the EU of being convicted for a violation. It is however rather doubtful that this mechanism will be implemented frequently due to the obstacles set out above. The EU will first have to convince the non-EU parties to the Convention that the prior involvement procedure will not provide the EU with unjust benefits but merely is a tool to adapt the accession to the specific nature of the EU legal system.⁶⁰

The exhaustion rule is a complex matter and can also be seen as a complication of the accession process indeed.

7. *The Future of the Bosphorus Presumption*

When considering future complications, the *Bosphorus* presumption must be taken into account. As described earlier, the ECtHR was rather lenient towards the Court of Justice in this ruling. It may be argued that the Court thereby sought to avoid possible conflicts with the CJEU and tried to show respect towards it.⁶¹ Currently, by virtue of this decision, the ECtHR does not review the actions of EU member states in cases where they were implementing EU measures as such and where they did not granted any leeway. However, once the EU has acceded to the ECHR, its current special position established by this ruling cannot be justified anymore towards the other parties to the Convention. Firstly, it would privilege the EU and secondly, as this would constitute unequal treatment of the parties to the Convention, the

⁵⁵ CJEU: Discussion document of the on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 2010.

⁵⁶ X. Groussot et al, 218 *Fondation Robert Schuman European Issues* (2011), p. 16.

⁵⁷ *Ibid.*

⁵⁸ Art. 35(1) ECHR.

⁵⁹ J. Králová, 08 *Czech yearbook of public and private international law* (2011), p.133.

⁶⁰ *Ibid.*

⁶¹ K. Kuhnert 'Bosphorus: Double standards in European human rights protection?' 2 *Utrecht Law Review*, 2 (2006), p. 180.

Court may lose credibility.⁶² Consequently, the presumption will most likely come to an end.

In more concrete terms, this would mean the end of the ECtHR presuming that the EU's protection of human rights is equivalent to that of the ECtHR system. Once the accession is completed, the ECtHR will be able to scrutinize the all acts of the EU institutions (therefore including the CJEU). This will mean that the CJEU will in fact be subordinated to the ECtHR. This formal change in position is a fact, however how exactly this new hierarchy will affect their relationship- one cannot say for sure.

8. *Conclusion*

Undoubtedly, the accession of the EU to the ECHR will improve the judicial protection of human rights, yet there is still a long way to go until the negotiation process is completed. Even though the accession is in the EU's own interest (as it significantly undermines its credibility on the international stage at the moment not to be party to an external control mechanism), it made the maintainability of her autonomy a clear prerequisite for the accession to the Convention. To guarantee this, the co-respondent mechanism and the prior-involvement procedure are brought forward as possible solutions. For the future relationship the implementation of the mechanism and the procedure will play an important role. But no matter how they are going to be implemented, Protocol no. 8 already constitutes a safeguard in this respect, as it specifically requires that the future accession agreement shall ensure that the specific characteristics of the EU are preserved.⁶³ It is made clear that the EU puts much effort in maintaining its legal order (above all the autonomous character of its legal order by pursuing to preserve its exclusive jurisdiction). Considering this endeavour in combination with the fact that the Bosphorus presumption will most probably cease to exist by the introduction of the new formal hierarchy where the ECtHR is able to scrutinize EU acts, it is presumable that the friendly relationship between the two Courts will turn grimmer.

⁶² T. Lock, *Law and Governance in Europe Working Paper Series* (2011), p. 15.

⁶³ X. Groussot et al., *218 Fondation Robert Schuman European Issues* (2011), p. 2.

THE EU CHARTER OF FUNDAMENTAL RIGHTS AND THE PRINCIPLE OF SUPREMACY

Lea Main-Klingst

1. Introduction

The case of *Melloni* has certainly not been the first time that the possible conflict of interests between national Member State law, and that of the Union has been highlighted. The case, like many others before it, puts emphasis on the difficulty as regards the principle of supremacy.

On the one hand, EU law is meant to take precedence over Member State law.¹ On the other hand however, Article 4(2) TEU states that: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and *constitutional* [italics added], inclusive of regional and local self-government.’ This position of preservation as regards national character and diversity between the Member States especially with regard to constitutional identity,² also referred to as constitutional pluralism,³ is also confirmed in Member State law. Article 23(1) read in conjunction with Article 79(3) of the German Constitution (Basic Law) for example, explicitly states that the Federal Republics’ constitutional identity is inviolable and unchangeable as relates to human dignity and human rights (Article 1) as well as in relation to its constitutional principles (Article 20). These are characterized as its democratic and federal nature and furthermore the principle that public authorities are bound by the rights-guarantees as prescribed by the Basic Law.⁴ The principle of constitutional identity, which fundamental rights protection forms an essential part of, can thus be a constraint on European integration.

Taking these two points into consideration, the question arises what to do when there is a conflict between EU supremacy and Member State law, and more specifically, how to resolve conflicts of interpretation or application of fundamental rights between the Court of Justice of the European Union (CJEU) and Constitutional Courts. What happens if rights granted by these two distinct legal orders overlap? Whose judgment should be given priority? These are the essential divergences this paper will aim to outline and discuss.

The paper will start out by offering a definition of the main term concerned, this being supremacy. Next some German case law will be studied. This will give an interesting perspective for various different reasons. Firstly, because of Germany’s one of a kind fundamental and human rights catalogue in its Basic Law, which can be seen as a response to the atrocities of the Second World War. Secondly, and more importantly however German case law is the most extensive in this field and thus offers the best overview. Thirdly, it has been argued that Charter of Fundamental Rights was not only heavily influenced by the

¹ A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, (Oxford University Press, 2009), p. 34.

² Nik de Boer, ‘Uniformity or Deference to National Constitutional Traditions in the Protection of Fundamental Rights? Opinion AG Bot in Case C-399/11 *Melloni*’ (*European Law Blog*, 25 October 2012), available at <<http://europeanlawblog.eu/?p=1168>> (last visited 04.12.2012).

³ Von Bogandy *et al.*, ‘Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States’, 49 *Common Market Law Review* (2012), p. 491.

⁴ Payandeh, ‘Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice’, 49 *Common Market Law Review* (2011), pp. 18-19.

German Basic Law,⁵ but that it could be considered ‘if not a child, at least a godchild of Germany.’⁶ And lastly, because, as can be deduced from *Internationale Handelsgesellschaft*, a case that will be discussed in detail below, German Courts’ insistence that the EU respect fundamental rights, or else the supremacy of EU law would be ignored, has been established as the original motivation behind the EU’s regime of fundamental rights’ protection.⁷ The case law will then be used as the framework for analysing the German stance on the supremacy of Union law. This study will ultimately lead up to an examination of Article 53 of the Charter in correlation with the different interpretations offered by the Spanish Constitutional Court in its judgment of the *Melloni* case. A look will also be taken at the General Advocate Bot’s opinion relating to the principle of supremacy. The paper will conclude with a short summary of the progress from the German case law in the 1970’s to the *Melloni* case of 2012. Finally a personal opinion will be given, relating to the question as to whether or not Member States should be able to deviate from EU law in order to provide for a higher standard of protection of fundamental rights.

2. The Principle of Supremacy

In order for the objectives underlying this paper to be understood correctly, the term ‘supremacy’ needs to be defined in order to allow for full understanding of this paper.

The first decision, which established this principle, was that of *Costa v ENEL* in 1964. It formally integrated the EEC Treaty into the legal systems of the Member States⁸ thus the national courts were bound to apply it.⁹ Moreover, if Community law would not be supreme to national law, it would be almost impossible for the Union to achieve its goals. This position was further strengthened in the 1978 *Simmenthal* case where the Court held that EC law would overrule national provisions. This implicated that supremacy of EU law applied no matter if the national law had been enacted before or after EU law.¹⁰ Moreover this also meant that a court would be required to give immediate effect to Union law, without anticipating the Constitutional Court’s ruling.¹¹ This however does not mean that national law has to be invalidated or annulled. The implications of this judgment are that the national laws are simply not to be applied.¹²

Thus for reasons of clarification, the principle of supremacy simply means that in a hierarchical structure EU law takes precedence over national (Member State) law,¹³ including national constitutional law.¹⁴ Such supremacy has generally been acknowledged and respected by the Member States, except in the case of supremacy of EU law in relation to state constitutions.¹⁵

⁵ Lenaerts & De Smitjer, ‘The Charter and the Role of the European Courts’, 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 90.

⁶ Besselink, ‘The Member States, the National Constitutions and the Scope of the Charter’ 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 68.

⁷ Douglas- Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’, 11:4 *Human Rights Law Review* (2011), p. 669.

⁸ Case C-6/64 *Costa v. ENEL*, [1964] ECR 585.

⁹ Case C-6/64 *Costa v. ENEL*, [1964] ECR 585.

¹⁰ P. Craig & G. de Burca, *EU Law: Texts, Cases, and Materials*, (Oxford University Press, 2011), p. 261.

¹¹ *Ibid.*, p. 263.

¹² *Ibid.*, p. 264.

¹³ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 675.

¹⁴ Payandeh, 49 *Common Market Law Review* (2011), p. 11.

¹⁵ Torres Pérez, *Conflicts of Rights in the European Union*, p. 35.

3. *Setting the Stage of the Fundamental Rights Conflict*

Before fully diving into the case law and analysing the stance of the German Constitutional Court, the stage needs to be set. Meaning that the problems and conflicts created as a consequence of an overlap between the principle of supremacy, EU fundamental rights protection and Member State fundamental rights protection, need to be put under the microscope. We first need to understand what the difficulties really are, before we can gather information on it and form an informed opinion.

It has been understood, that the EU generally assumes supremacy in relation to the national law of its Member States. However, the EU did not just create itself. It was created by 6 sovereign nation-states, some might even argue as a reaction to the Second World War,¹⁶ since the war illustrated the destructive nature of complete state sovereignty.¹⁷ Thus there was a desire for supranational institutions that would create limits to such state power.¹⁸ On the one hand these limitations are in the shape of the Treaties and institutions that led to the creation of the European Union itself. On the other hand such restraint is also given, for example, by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a legally binding instrument. Additionally, on 1 December 2009, the Charter of Fundamental Rights of the European Union was given legally binding force.¹⁹ Thus, multiple spheres of rights protection coincided: those of the national constitutional courts, that of the Court of Justice of the European Union (CJEU) and finally that of the European Court of Human Rights (ECtHR).²⁰ Hence it can easily be discerned that conflicts can arise where rights granted by these three institutions overlap,²¹ and are not fully compatible. However, whereas the ECHR clearly sets out in Article 53 that its Articles are merely meant to set a floor, if not to say a minimum standard of protection beneath which none of the contracting parties may fall,²² the same does not hold true for the European Charter of Fundamental Rights.²³ A comprehensive analysis of its limits and scope has never been given until recently in Advocate General Bot's decision in relation to the *Melloni* case. The importance of this will be further considered below. Additionally, the CJEU consistently reaffirmed its position that the ECHR can be regarded as one of its main sources when interpreting EU fundamental rights.²⁴ It did however not choose to adapt the Convention's position concerning the interplay between constitutional courts and the ECtHR. In this light it is also interesting to consider that the CJEU has explained that when protecting fundamental rights the constitutional traditions²⁵ of the Member States would serve as a source of inspiration.²⁶ Given however the diverse character and constitutional traditions of the Member States,²⁷ as well as the different levels of significance fundamental rights protection is attributed in the Member States,²⁸ this appears to be an almost impossible task. When

¹⁶ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 645.

¹⁷ Torres Pérez, *Conflicts of Rights in the European Union*, p. 2.

¹⁸ *Ibid.*, p. 2.

¹⁹ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 646.

²⁰ Torres Pérez, *Conflicts of Rights in the European Union*, p. 3.

²¹ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 647.

²² Torres Pérez, *Conflicts of Rights in the European Union*, p. 29.

²³ *Ibid.*, p. 36.

²⁴ Case C- 4-73 J. Nold, *Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, para. 12 – 13.

²⁵ Lenaerts & De Smitjer, 8(1) *Maastricht Journal of European and Comparative Law* (2001), 90.

²⁶ Colneric, 'Protection of Fundamental Rights through the Court of Justice of the European Communities', (2001) *Institute of European and Comparative Law – University of Oxford Faculty of Law*, available at <<http://denning.law.ox.ac.uk/iecl/pdfs/working2colneric.pdf>> (last visited 04.12.2012).

²⁷ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 670.

²⁸ Besselink, 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 70.

adhering to the supremacy principle, the EU fundamental rights would not only set a minimum standard of protection, but would also claim authority over constitutional rights,²⁹ thus also setting a ceiling. This position has however not been ascertained in the interpretation of text of the Charter and has been disputed by many Constitutional Courts, especially as regards the relationship of EU and state constitutional law,³⁰ including that of the Federal Republic of Germany.

4. Germany

The discussion relating to fundamental rights started as early as 1970, with the *Internationale Handelsgesellschaft*³¹ case where the CJEU, for the first time, officially recognized fundamental rights as part of the EU legal order³² and the EU legal systems.³³ This can be regarded as an act to ascertain primacy of (then) Community law,³⁴ as the German Federal Constitutional Court had previously ruled that in the case of conflict the fundamental rights protected by the German Basic Law would take precedence over the conflicting EU law.³⁵ Thus the principle of supremacy, in this context, applies always in relation to directly effective EU law and irrespective of whether or not national fundamental rights are concerned.³⁶ It was then when the ECJ started to build its case law relating to and protecting fundamental rights.

An important milestone in the relationship between national constitutional courts and the ECJ in the interpretation and protection of fundamental rights was the judgment of *Solange II* in 1986. In this case, the German Federal Constitutional Court held that it would no longer exercise its jurisdiction in this field of law, as long as equivalent protection of the fundamental rights protected by the constitution would be afforded similar protection by ECJ's case law.³⁷ Meaning that as long as protection provided by the EU regime proved to be satisfactory³⁸ and of an essentially equivalent degree³⁹ the Constitutional Court would see no reason or requirement to act.⁴⁰ This judgment did however not establish that the Constitutional Court would give up its power to review altogether; it was merely conditioned.⁴¹

The importance of this case and its ruling can be further illustrated in its relation to the *Maastricht* judgment of 1993.⁴² In this case the Constitutional Court reiterated the position it had taken in the *Solange II* judgment, namely that the Federal Constitutional Court would exercise its competence only if there was a gross departure from the level of fundamental rights as guaranteed under the German Basic Law.⁴³ The Constitutional Court however

²⁹ Torres Pérez, Conflicts of Rights in the European Union, p. 36.

³⁰ Torres Pérez, Conflicts of Rights in the European Union, p. 57.

³¹ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970].

³² Torres Pérez, Conflicts of Rights in the European Union, p. 138.

³³ *Ibid*, p. 35.

³⁴ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 676.

³⁵ Craig & de Burca, *EU Law: Texts, Cases and Materials*, p. 274.

³⁶ *Ibid*, p. 261.

³⁷ BVerfGE 73, 339 2 BvR 197/83 *Solange II*, para. f.

³⁸ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 676.

³⁹ Colneric, 'Protection of Fundamental Rights through the Court of Justice of the European Communities' (2001), 9.

⁴⁰ Payandeh, 49 *Common Market Law Review* (2011), p. 13.

⁴¹ Torres Pérez, Conflicts of Rights in the European Union, p. 56.

⁴² BVerfGE 89, 155.

⁴³ Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'', 7(1) *European Law Journal*, (2001), p. 103.

emphasized that it did still hold the power of judicial review.⁴⁴ The court decided that it would more actively examine the compliance of acts of the EU with fundamental rights,⁴⁵ to ensure proper protection as required by the German Basic Law. After the judgment had been given, it was interpreted by some as the reversal of the Court's *Solange II* decision, and that the Court had thus decided to return to the principle that the Federal Constitutional Court was the final arbitrator in fundamental rights conflicts, as long as the Community did not yet have a comprehensive catalogue of fundamental rights (*Solange I*; BVerfGE 37, 271).⁴⁶

In its *Banana decision* of June 2000,⁴⁷ the Constitutional Court shed light onto this debate, by ascertaining that parallel protection was not necessary.⁴⁸ Meaning that as long as a similar right was protected by the ECJ case law, there would be no reason for the Constitutional Court to practice its judicial review. The Constitutional Court thus established a very high hurdle for the admissibility of claims against EU legal acts; the level of fundamental rights protection had to have fallen below a sufficient standard.⁴⁹ Meaning that an applicant would have to prove that the EU no longer provided an acceptable level of human and fundamental rights protection.⁵⁰ Thus even though a high hurdle was established, if EU fundamental rights proved to not provide adequate protection, the Constitutional Court permitted lower courts to temporarily suspend the efficacy of the EC regulation⁵¹ in favour of constitutional law. This case serves as a further illustration of the complex matter of 'national fundamental rights control over Community law'.⁵²

Lastly, the *Omega Spielhallen* case of 2004 will be considered. It exemplifies yet another approach to the role of the Constitutional Court and the relationship between fundamental rights under the national constitution, the CJEU and the Charter.

The Federal Constitutional Court referred a question to the ECJ relating to a conflict of rights, namely the clash between the protection of human dignity as safeguarded by the German Basic Law and the freedom to provide services as ensured under EU law.⁵³ The applicant, a company by the name of Omega, had been operating a laserdrome game, which centred on the simulation of homicide.⁵⁴ The facilitation of the game was subsequently forbidden by the police authority, on the basis that the purpose of the game was 'contrary to fundamental values prevailing in public opinion'.⁵⁵ Prior to the application reaching the Constitutional Court, Omega had objected to the prohibition before several lower courts. The Constitutional Court, before referring the case to the ECJ, however established that it believed that Omega's appeal should be dismissed on the basis of the German constitution. It did nonetheless question whether such judgment would be compatible with Community law.⁵⁶ It never came to such conflict, because the CJEU reaffirmed the position of the Federal Constitutional Court by recognizing the 'fundamental importance of the principle of human dignity',⁵⁷ not only in German law but also in Community law. Moreover, it recognized that the importance given to

⁴⁴ Payandeh, 49 *Common Market Law Review* (2011), p. 13.

⁴⁵ Schmid, 7(1) *European Law Journal*, (2001), 107.

⁴⁶ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 676.

⁴⁷ BVerfG, 2 BvL 1/97 vom 7.6. 2000, Absatz-Nr. (1-96) – Bananenmarktordnung.

⁴⁸ Colneric, 'Protection of Fundamental Rights through the Court of Justice of the European Communities' (2001), p. 10.

⁴⁹ Payandeh, 49 *Common Market Law Review* (2011), p. 13.

⁵⁰ *Ibid*, p. 29.

⁵¹ Torres Pérez, *Conflicts of Rights in the European Union*, p. 17.

⁵² Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 676.

⁵³ *Ibid*, p. 670.

⁵⁴ *Ibid*, p. 670.

⁵⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-09609, para. 5-7.

⁵⁶ *Ibid*, para. 10.

⁵⁷ *Ibid*, para. 16.

public policy may differ from Member State to Member State and that therefore national authorities would be given a margin of discretion.⁵⁸ In other words, this means that the subject matter discussed, as well as its adjudication would be left to the Member States.⁵⁹ There is no concrete explanation for why the ECJ ruled this way. Arguably, the German courts might have challenged the decision and thus the supremacy of EU law, if the judgment had been in favour of the applicant, as human dignity forms a vital part of the German Basic Law.⁶⁰ Summarising and concluding all these cases, it can be established that there is conditional acceptance of EU law by the German Court.⁶¹ The Federal Constitutional Court conditionally reserves its powers of judicial review, but does not exercise them as long as the fundamental rights protection regime of the Union is comparable to that guaranteed under German Basic Law.⁶² Whereas numerous judgments of the ECJ have illustrated an apparent disposition to consider the Charter as the key or principal source of EU fundamental rights as well as a norm coherent to which fundamental right claims are to be adjudicated,⁶³ we have observed that the same does not always hold true for the courts of the various Member States. Thus, in order to avoid such conflicts in the future it is of fundamental importance that Article 53 of the Charter be interpreted.

5. *Article 53 of the European Chart of Fundamental Rights*

The basis for the relationship between the various national constitutions and the Charter can be found in Article 53 of the Charter relating to the ‘Level of Protection’.⁶⁴ The Article states as follows:

‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.’

The wording of this Article is somewhat ambiguous,⁶⁵ as no clear definition is given of what ‘their respective fields of application’ are. The European Court of Justice, the judicial organ responsible for the enforcement of the Charter, has not yet given a clear definition of Article 53,⁶⁶ thus leaving room for interpretation.

⁵⁸ *Ibid*, para. 31.

⁵⁹ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 670.

⁶⁰ *Ibid*, p. 670.

⁶¹ *Ibid*, p. 681.

⁶² Von Bogandy *et al*, 49 *Common Market Law Review* (2012), p. 508.

⁶³ Pech, ‘Between Judicial Minimalism and Avoidance: The Court of Justice’s Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*’, 49 *Common Market Law Review* (2012), p. 1843.

⁶⁴ Besselink, 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 72.

⁶⁵ *Ibid*, p. 73.

⁶⁶ Sánchez, ‘The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ’s Approach to Fundamental Rights’, 49 *Common Market Law Review* (2012), p. 1607.

For these reasons, the Spanish Constitutional Court referred a case to the Court of Justice of the European Union, on 9 of June 2011.⁶⁷

Italian national Stefano Melloni had filed a complaint with the Spanish Constitutional Court on the basis of Article 24(2) of the Spanish Constitution, claiming that the European Arrest Warrant was in breach of the fundamental right to a fair trial as guaranteed by the Spanish Constitution.⁶⁸

Mr Melloni had been sentenced *in absentia* by an Italian tribunal. Previously he had been convicted and released on bail in response to which he fled to Spain. Subsequently, upon Mr Melloni's sentencing the tribunal issued a European Arrest Warrant,⁶⁹ which the Spanish authorities had complied with and which subsequently had resulted in the arrest of Mr Melloni.⁷⁰

The Spanish Constitutional Court was thus confronted with the question whether the Framework Decision relating to the European Arrest Warrant, prevented Spanish courts from granting the applicant all his fundamental rights as protected by the Constitution.⁷¹ This ultimately boils down to the question if the Framework Decision underlying the European Arrest Warrant was incompatible with the Spanish Constitution, and if so, which of the two would take precedence.⁷²

Thus, when referring this question to the Court of Justice of the European Union, the Spanish Constitutional Court included three possible interpretations of Article 53 of the Charter, which would in the long run help solve the conflicts that resulted from these overlapping rights. The three interpretations will be considered below.

The first interpretation offered by the Spanish Constitutional Court paralleled Article 53 of the Charter to Article 53 of the European Convention of Human Rights. According to this analysis, the Charter would thus set a minimum standard, if not to say a floor, for the protection of fundamental rights.⁷³ Thus Member States would not be allowed to fall beneath the required standard, they would however be permitted to set a maximum of protection in accordance with their respective constitutions.⁷⁴

The second interpretation aimed 'to define the scope of the Charter', meaning that where the Charter applies it has to be adhered to (this relates to 'respective fields of application'). Conversely, where the Charter is not applicable, the constitutions of the Member States are considered to be relevant to ensure the protection of fundamental rights.

The third interpretation given to Article 53 of the Charter embodies a combination of the first two interpretations.⁷⁵ Which of the two applies would depend on the circumstances of each case.⁷⁶ Consequently, this approach entails that where constitutional protection was higher than that of the Charter, and no other rights were at stake, the constitutional protection would apply, without however imposing a uniform standard on other Member States. This would be analogous to the *Omega* judgment.⁷⁷

As mentioned above, no clear judicial interpretation of Article 53 has been given, nonetheless

⁶⁷ Torres Pérez, 'Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011', 8 *European Constitutional Law Review* (2012), p. 105.

⁶⁸ Case C-399/11 Criminal proceedings against Stefano Melloni, [2012], para. 23.

⁶⁹ *Ibid.*, para. 19.

⁷⁰ *Ibid.*, para. 20.

⁷¹ *Ibid.*, para. 29.

⁷² *Ibid.*, para. 30.

⁷³ *Ibid.*, para. 91.

⁷⁴ Case C-399/11, para. 92.

⁷⁵ Torres Pérez, 8 *European Constitutional Law Review* (2012), p. 117.

⁷⁶ Case C-399/11, para. 93.

⁷⁷ Torres Pérez, 8 *European Constitutional Law Review* (2012), p. 117.

for the purpose of this paper it is interesting to look at the opinion of Advocate General Bot for two distinct reasons. Firstly, even though the opinions of the Advocate General do not bind the Court in any way,⁷⁸ and they are merely intended to supply the judges with an impartial and independent advice, it has generally been observed that such opinions often entail studies of national constitutional law, which then consequently lead to and allow the interpretation EU fundamental rights.⁷⁹ And secondly, because the interpretations offered in the General Advocate's opinion are the first judicial statements relating to the meaning of Article 53 of the Charter, which ultimately leads us back to the question of supremacy as regards the ECJ and national constitutional courts.

In his reasoned submission, AG Bot firmly rejects the first interpretation by the Spanish Constitutional Court,⁸⁰ according to which Article 53 had to be seen as merely setting a minimum level of fundamental rights required by the Charter. He argues that this version would lead to a relinquishment of the principle of supremacy,⁸¹ as national constitutions would be assigned a higher rung on the hierarchical ladder than the Charter itself.

He does however not appear adverse to the following two interpretations. The Advocate General concludes that the text of the Charter was not intended to replace the respective provisions in the national constitutions,⁸² nor should Member States be required to lower their protection regime as to make it coherent with the Charter.⁸³ Bot furthermore concedes that where a provision of the Charter seems to affect and more importantly undermine the national identity of a Member State, that state should be able to challenge such a provision, using Article 4(2) as its foundation.⁸⁴ He additionally distinguishes between situations⁸⁵ where a definition at European Union level exists, and where it does not.⁸⁶

Ultimately, Advocate General Bot comes to the conclusion that Article 53 should be interpreted and read in connection with Article 51 and 52 of the Charter. This would ultimately amount to the Charter setting a standard of fundamental rights only within the European Union's field of application.⁸⁷

As for the case of *Melloni*, this would mean that the Spanish Constitutional Court would not be permitted to grant the applicant (subject to the arrest warrant) a retrial, which would be pursuant to the constitution, because such is not permitted by the Framework Decision,⁸⁸ and moreover the Court had not claimed a conflict with its national identity.⁸⁹

As previously mentioned, the opinion of the Advocate General is not binding on the Court. The Court can thus mend the interpretation of the Charter into any direction it wishes. The ECJ could choose to adopt Article 53 as the highest possible standard, or it could choose to leave 'a margin of appreciation' to the national courts.⁹⁰ This would mean that national courts would be able to adjudicate in cases where constitutional protection is higher than that of the charter. This would be in line with *Omega*.⁹¹

⁷⁸ Craig & de Burca, EU Law: Texts, Cases and Materials, p. 62.

⁷⁹ Torres Pérez, Conflicts of Rights in the European Union, p. 163.

⁸⁰ Case C-399/11, para 96.

⁸¹ *Ibid*, para. 97.

⁸² *Ibid*, para. 135.

⁸³ *Ibid*, para. 134.

⁸⁴ *Ibid*, para. 139.

⁸⁵ Nik de Boer, *European Law Blog*, 25 October 2012.

⁸⁶ Case C-399/11, para. 124.

⁸⁷ *Ibid*, para. 133.

⁸⁸ Case C-399/11, para. 135.

⁸⁹ Nik de Boer, *European Law Blog*, 25 October 2012.

⁹⁰ Sánchez, 49 *Common Market Law Review* (2012), pp. 1606-1607.

⁹¹ *Ibid*, p. 1608.

Either way, it is desirable for the Court to interpret the Article⁹² in order to elucidate, in this situation for the Spanish Constitutional Court, whether the application of national fundamental rights is permitted if these are of a higher standard,⁹³ and in general for all Member State's courts to clarify the relationship between the fundamental rights of the relevant national constitutions and those enshrined in the Charter.

6. Conclusion

Even though, rightfully concluded, the Charter can be considered as including fundamental rights and values that are also present in various national constitutions,⁹⁴ as we have seen various national courts, most notably the German courts, pose a threat to the supremacy of the CJEU. Not only because diverging interpretations of essentially the same fundamental rights exist,⁹⁵ but also especially when it is believed that the EU protection of fundamental rights is not at a high enough level.⁹⁶ However as we have seen in the case law, the German courts have taken a backseat when it comes to the protection of fundamental rights, as long as EU law guarantees equivalent protection⁹⁷ (*Solange II* and *Banana Market*). The ECJ has in turn allowed constitutional traditions to influence its EU fundamental rights interpretation⁹⁸ (*Omega*), without requiring uniform application.

The difficulties in this are however, that contrary to the principle of EU supremacy, the CJEU is part of a system of constitutional pluralism in which its position as final judge is not routinely acknowledged.⁹⁹ There is no concluding arbiter at all. So who gets the final say and which provision takes precedence, that of EU law or that of the national constitution, remains unclear. That is the element of one of the questions, the Spanish Constitutional Court referred to the CJEU in *Melloni*, and that is also the question this paper tries to give a little more substance to.

When taking another look at the three different interpretations of Article 53 offered by the Spanish Constitutional Court, I would suggest that a fourth interpretation should be added. Namely, that the fundamental protection regime that is to apply in the situation of an overlap is that which guarantees the highest level of protection. I believe that the main concern of this debate should not be whether Member States or the EU take precedence when it comes to protection and interpretation of fundamental rights, but that the main concern should be offering the Union's citizens (and thus also the citizens of each and every Member State) the best possible protection of their rights. This would require interplay between the two parties, rather than a feud relating to primacy or precedence.

All Member States of the Union share a minimum of the same principles¹⁰⁰ of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' (Article 6.1 Treaty Establishing the European Community), thus I would argue that the protection of basic fundamental rights is always guaranteed. Furthermore the respect and observance of fundamental rights is part of the Copenhagen criteria, which embody conditions required for

⁹² Torres Pérez, 8 *European Constitutional Law Review* (2012), p. 126.

⁹³ Sánchez, 49 *Common Market Law Review* (2012), p. 1608.

⁹⁴ Besselink, 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 80.

⁹⁵ Lenaerts & De Smitjer, 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 96.

⁹⁶ Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 680.

⁹⁷ Besselink, 8(1) *Maastricht Journal of European and Comparative Law* (2001), p. 80.

⁹⁸ Torres Pérez, *Conflicts of Rights in the European Union*, p. 143.

⁹⁹ Gerards, 'The Prism of Fundamental Rights', 8 *European Constitutional Law Review* (2012), p. 175.

¹⁰⁰ Torres Pérez, *Conflicts of Rights in the European Union*, p. 122.

accession.¹⁰¹ This is why I don't see any difficulties if only Member State law is applied. This standpoint is further supported by the argument that the CJEU only recognised fundamental rights to protect its supremacy against the claims of national constitutional courts, and that thus fundamental rights were at first not at the core of the (then) Communities', as it is for example in the German Basic Law.¹⁰²

Furthermore, I would argue that recognizing and permitting a certain level of diversity does not automatically jeopardize the goals of the Union itself.¹⁰³ I believe that it is important to sustain a certain degree of variety, as the differing national characters of its Member States contribute to the formation of the Union's character and uniqueness itself.

Thus in conclusion, even though it cannot be said that there are gross differences between fundamental rights granted by the EU Charter and those, for example, given by the German Basic Law, the interpretation of these rights is what causes difficulties. Both protect the right to and respect of family, however what is to be understood as family can be disputed. Take for example a gay couple.¹⁰⁴ Would they constitute a family under both systems? Thus applying homogenous interpretations at Union level does not necessarily mean that the citizens are given the most satisfactory level of protection.¹⁰⁵ Another example that serves as an illustration of the Union's diversity can be seen in the Irish Constitution, which protects the rights to life of the unborn. This right however is not explicitly mentioned in other state constitutions or the Charter.¹⁰⁶

In brief, I would argue that the highest degree of fundamental rights protection and individual freedom is what both regimes should strive for. Therefore, if national constitutional courts provide for a higher level of protection than the ECJ, for protection that is not outlined in the Charter, or for the protection of a fundamental right momentous to their constitution, they should be allowed to deviate.

¹⁰¹ Kluwer Law International, 'Editorial Comments: Fundamental Rights and EU Membership: Do as I say, not as I do!', 49 *Common Market Law Review* (2012), p. 481.

¹⁰² Douglas-Scott, 11:4 *Human Rights Law Review* (2011), p. 679.

¹⁰³ Torres Pérez, *Conflicts of Rights in the European Union*, p. 57.

¹⁰⁴ Torres Pérez, *Conflicts of Rights in the European Union*, p. 78.

¹⁰⁵ *Ibid*, p. 13.

¹⁰⁶ *Ibid*, p. 12.

THE INDEPENDENCE OF THE HUNGARIAN JUDICIARY: AN EU PROBLEM?

Sinead Haywood

1. Introduction

‘Hungary, like all Member States, is obliged by the EU Treaties to guarantee the independence of its National Central Bank and its Data Protection Authority and the non-discrimination of its judges. The Commission is determined to take any legal steps necessary to ensure that the compatibility with European Union legislation is maintained.’ Strong words from President José Manuel Barroso. According to the EU Commission,¹ the Hungarian government’s new constitution, which came into force in January 2012, and the legislation which came into force with it, is not compatible with EU law or principles.² This paper will look at what measures have been taken by the Hungarian government, particularly in relation to the judiciary, and take a glance at Hungary’s past to see where this constitutional change came from. It will examine the justifications presented by the government for these actions and will comment on this. Further, an attempt will be made to present the notion that this is an EU problem, although not solely, and show why. The case ruled on by the European Court of Justice in November 2012 will be presented and finally a conclusion will be provided with suggestions of what further action can be taken.

2. The Situation in Hungary – What is all the Fuss About?

In order to grasp where the issues at hand originated, we must briefly delve into the past and take at least a cursory look at Hungary’s recent political history of the last few decades, particularly the rise of the Fidesz party. Post World War Two Hungary saw communist control being seized in the fraudulent elections of 1947 and soon after a Soviet-style constitution was introduced while political parties saw themselves being coerced into merging and forming one mega-party, the Hungarian Socialist Workers’ Party (MSZMP).³ Though there was temporary relief in 1953 from the oppressive measures under the regime, namely Imre Nagy’s term as Prime Minister as he freed many political prisoners and attempted to end political persecution, the economic deterioration of the time saw the previous Prime Minister, Mátyás Rákosi, retake his position within two years.⁴ However, by 1956 revolution was breaking out as a result of student protesters being fired upon by security forces.⁵ This was enough for Nagy to regain support and resume office, disband the security police and abolish the one-party system while resolving to hold free elections.⁶ In light of the withdrawal from the Warsaw Pact in November 1956, János Kádár, the Party’s First Secretary, fled only to return and form a new government with Soviet support which led to massive reprisals and bloodshed while thousands fled in fear for their safety. Nagy was deported and, on his

¹ European Commission – Economic and Financial Affairs, available at http://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm (last visited 05.12.2012).

² Ibid.

³ International Bar Association’s Human Rights Institute, ‘Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary,’ p. 15.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

eventual return, executed.⁷ Soon the economy was looking healthier and western trade seemed viable.⁸

It is at this stage that today's ruling party, Fidesz, came into being. The centre-right party, established in 1988, promoted European integration.⁹ It developed from a party for those under thirty-five to later include all others and be re-branded as the Hungarian Civic Alliance in 2003.¹⁰ The party's power grew throughout the 1990s and by 1998 it was the largest party in the National Assembly with 148 seats (of a possible 386).¹¹ However, under the presidency of Viktor Orbán, the party lost its power in 2002 and was replaced by a Socialist government.¹² Nevertheless, after several scandals, growing economic struggles and the second elections since entering the EU in 2004, the Fidesz party returned to power in April 2010 after joining forces with the Christian Democratic People's Party (KDNP).¹³ This was a pivotal moment in Hungarian politics as, by gaining a two-thirds majority, the Fidesz party was in a position to bring about constitutional change.¹⁴ The party wasted no time in flexing its new found muscles and within one year announced a new constitution.¹⁵ Many laws were swiftly introduced and those which were not already applicable came into effect on January 1st 2012 when the new 'constitutional order' settled in.¹⁶ This brings us to the main point of discussion, namely the current measures adopted by the new Hungarian coalition government. The Fundamental Law of Hungary of 25 April 2011 (Fundamental Law) was preceded by the Transitional Provisions of Hungary's Fundamental Law with further 'cardinal laws' of note also bringing about significant change; including the Cardinal Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary (AOAC), the Cardinal Act CLXII of 2011 on the Legal Status and Remuneration of Judges (ALSRJ), and the Cardinal Act CLI on the Constitutional Court (CCA).¹⁷ One would be forgiven for asking: what is so controversial about a new government wanting to bring reform to a system which had been blighted by turmoil and the heavy handed rule of communism? If knowing that many of these cardinal laws were the result of private members' bills is not enough to raise one's eyebrows then perhaps pointing out that even the Fundamental Law began as a private members' bill will be enough. According to the International Bar Association, this is 'remarkable'.¹⁸ Further, the speed by which these bills were passed into law is great cause for concern; for example, a bill restricting the number of state recognised religious bodies (in itself questionable) was amended at the last minute and distributed amongst deputies only *ten minutes* prior to them having to vote on it.¹⁹ This cannot possibly allow any room for true democratic debate. When we turn our attention to the Transitional Provisions, worry is further instilled in anyone with a sense for democracy when one takes note that these provisions are not transitional in nature but indeed 'appear to substantively change the Constitution'.²⁰ Particular elements of the

⁷ International Bar Association's Human Rights Institute, p. 16.

⁸ International Bar Association's Human Rights Institute, p. 16.

⁹ Britannica.com, Fidesz, available at <<http://www.britannica.com/EBchecked/topic/1004859/Fidesz>> (last visited 05.12.2012).

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ D. Ó Beacháin, V. Sheridan and S. Stan (Eds.), *Life in Post-Communist Eastern Europe after EU Membership*, (Routledge, 2012).

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ K.L. Scheppele, 'The Unconstitutional Constitution,' blog in *New York Times*, available at <<http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/>> (last visited 05.12.2012).

¹⁷ International Bar Association's Human Rights Institute, p. 17.

¹⁸ Ibid. p. 41.

¹⁹ Ibid. p. 41.

²⁰ Ibid. p. 42.

Transitional Provisions even breach the new Fundamental Law itself when allowing for the President of the National Judicial Office (NJO) – discussed later – and the Chief Prosecutor to assign cases to particular courts.²¹ Not only does this violate national law but it appears to be in violation of Article 6 of the European Convention on Human Rights (ECHR). What is most disturbing is the fact that the Hungarian Constitutional Court, critical of political developments, appears to be powerless in the face of the government. When the Court annulled a regulation which retroactively imposed a 98% tax on particular categories of severance pay, the government passed a bill²² restricting the Constitutional Court's jurisdiction over taxation issues.²³ By March 2012, it was found by the Venice Commission²⁴ that legislation was adopted in a hasty manner and did not allow for adequate consultation.²⁵ Not only the speed of the adoption caused consternation but the sheer number of laws adopted so speedily was worrying; it was estimated that over 359 laws had been passed by the Fidesz party since it gained power.²⁶

The organisation of the courts and independence of the judiciary was called into question by the setting up of the aforementioned NJO, which replaced the National Council of Justice's (NCJ)²⁷ collegial decision-making, whose new President was vested with the powers of 'operational management of the courts, human resources, budget and allocation of cases.'²⁸ This individual has a nine year term of office, dismissal requiring a supermajority in Parliament, has the power to appoint judges and, together with the (politically appointed) chief prosecutor, can decide which judges hear which cases.²⁹ Powers were initially stronger than they are now after the government addressed some of the issues of concern with an Amendment Act. However, the President still has excessive control³⁰ over judicial appointment, raising concerns that, despite having 'merit-based' criteria for appointment, judges will be selected for political reasons throwing fuel to the fire of controversy surrounding the questions of human rights law, in particular Article 6 ECHR.³¹ Any question over the political status of the President will be put to bed once the following fact has been digested: the NJO is headed by Tunde Hando – the wife of one of the Fidesz leading members.³²

What has deeply shocked the EU and the wider international community are the measures directly affecting the judiciary which have allegedly jeopardized the independence of

²¹ *Ibid.* p. 43.

²² Act CXIX of 2012.

²³ International Bar Association's Human Rights Institute, p. 43.

²⁴ The European Commission for Democracy through Law, also known as the Venice Commission due to its meeting place, advises the Council of Europe on constitutional concerns and in particular focuses on Member States' constitutions in relation to conforming with standards required by the EU, available at <http://www.venice.coe.int/site/main/Presentation_E.asp> (last visited 05.12.2012).

²⁵ Opinion on Act CLXII of 2011 on the legal status and Remuneration of Judges, available at <<http://www.venice.coe.int/docs/2012/CDL-AD%282012%29001-e.pdf>> (last visited 05.12.2012).

²⁶ K.L. Scheppele, 'The Unconstitutional Constitution,' blog in *New York Times*, available at <<http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/>> (last visited 05.12.2012).

²⁷ International Bar Association's Human Rights Institute, p. 26.

²⁸ European Commission – Economic and Financial Affairs, available at <http://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm> (last visited 05.12.2012)

²⁹ International Bar Association's Human Rights Institute, p. 30.

³⁰ *Ibid.* p. 29.

³¹ *Ibid.* p. 30.

³² Reuters, 'Hungary reform threatens courts' independence –report', available at <<http://www.reuters.com/article/2012/03/21/hungary-aid-reform-idUSL6E8EL92W20120321>>. (last visited 05.12.2012).

Hungarian judges. Of particular concern was the way in which 274³³ judges were prematurely and compulsorily retired as a result of the government lowering the retirement age from 70 to 62 (only for judges) and this being applied retrospectively.³⁴ Article 12 Transitional Provisions and the aforementioned Cardinal Act CLXII of 2011 on the Legal Status and Remuneration of Judges (ALSRJ) removed the upper age limit of 70 for judges apart from ‘certain public offices.’³⁵ Many of these judges have already been replaced. This is a blatant contravention of EU law in relation to age discrimination as indeed ruled on by the ECJ.³⁶ This retroactivity and contravention will be a point of discussion later when looking at the EU’s infringement case against Hungary. Even the Supreme Court judges were not safe from the new legislation,³⁷ as evidenced by the President of the Supreme Court being forced to step down for not having the (newly required) five years of Hungarian court experience – seventeen years at the European Court of Human Rights was not, apparently, sufficient any longer.³⁸ András Baka, who was appointed President of the Supreme Court in June 2009, should have, under the then in force Act LXVI of 1997 on the Organisation and Administration of the Courts, been able to complete his six-year term of office.³⁹ Under Article 73 of the law, the only possibility for termination of a court executive’s mandate was by mutual agreement or resignation, or by dismissal – the latter option only available should the executive be found incompetent.⁴⁰ Bill T/4743 was introduced in October 2011, which was later passed as the AOAC, defined ‘court executives’ listing all court presidents *except* the President of the Supreme Court (renamed the ‘Kúria’).⁴¹ Bill T/5005, introduced on November 20 2011, provided an additional option for the termination of the President of the Supreme Court’s mandate effective with the entry into force of the Fundamental Law.⁴² It is alarming to note the government’s apparent enactment of ‘a retroactive and *ad hominem* regulation.’⁴³ The impact of this may have a ‘chilling effect’ on the judiciary as individual judges may fear their criticism of government bills in their rulings during review may be held against them; this has massive repercussions when it comes to the independence of the judiciary and the principle of the rule of law.⁴⁴

The public is not only affected by the changes to the judiciary, it is also directly affected by the abolition of ‘the citizens’ right to take constitutional review on abstract points of law.’⁴⁵ It was argued that the right of *actio popularis* had put the Constitutional Court under strain as claims were so numerous while pointing out that abolishing this right would not, in itself, result in a situation any different to other European states which afforded no such right.⁴⁶

³³ European Commission – Economic and Financial Affairs, available at http://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm (last visited 05.12.2012).

³⁴ European Commission – Economic and Financial Affairs, available at http://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm (last visited 05.12.2012).

³⁵ International Bar Association’s Human Rights Institute, p. 35.

³⁶ Case C-286/12 *Commission v Hungary* [2012].

³⁷ Human Rights Watch, ‘Hungary: Reverse Interference with Courts, Media’, available at <http://www.hrw.org/news/2012/01/06/hungary-reverse-interference-courts-media> (last visited 05.12.2012).

³⁸ *Ibid.*

³⁹ International Bar Association’s Human Rights Institute. p. 26.

⁴⁰ *Ibid.* p. 26.

⁴¹ *Ibid.* p. 27.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.* p. 36.

⁴⁵ *Ibid.* p. 45.

⁴⁶ *Ibid.* p. 45.

It is not only the issues surrounding the judiciary, legislative and executive that present worrying developments. According to Human Rights Watch, Hungary's media law has also become 'problematic.'⁴⁷ A new body, tasked with regulating the media has been given far reaching powers to impose fines for "imbalanced news coverage," material it considers "insulting" to a particular group, or "the majority", or is deemed to violate "public morality."⁴⁸ Journalists have lost the legal protection of keeping their sources confidential, a move which is seen to curb the media's freedom and undermine human rights.⁴⁹ The measures enacted by the Fidesz controlled government are wide reaching and controversial to say the least. They appear to defy European and international legal obligations, the notion of democracy and have, unsurprisingly, been the subject of debate across the globe and internally while protests within the country have been tense. It is vital that one looks into what the justifications may be and if there is another side to the story.

3. *Are there any Justifications?*

One must of course, as in any academic paper, attempt to see more than one side of a problem – here, Hungary's justifications, which were given to the International Bar Association's Human Rights Institute (IBAHRI) on its independent reporting mission, will be presented and commented on. Firstly, the government presented the situation with which it was faced as one of a country still struggling in the aftermath of communist control and pointed to the fact that Hungary had, until January 1 2012, been living with the communist era constitution and that the time was nigh for a clean break from the past.⁵⁰ This may be a valid point and one can certainly see why a nation would feel the need, for the sake of national identity and to move on from painful wounds of history, to start afresh with a new constitution.

The next point of defence from the government was that it had indeed consulted the public who had approved the changes.⁵¹ One must ask how, exactly, is this claim backed up? The International Bar Association highlights the fact that Hungary was 'not obliged to hold a referendum on the constitutional changes it introduced' but chose to consult the public through 'questionnaires distributed to eight million voters, promising to take their views into account.'⁵² The delegation from the IBAHRI found that these questionnaires 'were not fit for purpose and that the consultation process had been so minimal as to render it meaningless.'⁵³ How consultation can be effective when, as outlined above, amendments to bills are made *minutes* before being voted on, leaving no time for examination or debate, and when the ordinary parliamentary procedures are not used so as to avoid the normal consultation process,⁵⁴ is beyond even the most flexible thinker.

The government put forward the claim that the judiciary needed an overhaul so as to make it more efficient. For over a decade, the judiciary had been almost self-governing but had the strain of case excesses and it was said that reform was necessary in order to deal with the

⁴⁷ Human Rights Watch, 'Hungary: Media Law Endangers Press Freedom', available at <<http://www.hrw.org/news/2011/01/07/hungary-media-law-endangers-press-freedom>> (last visited 05.12.2012).

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ International Bar Association's Human Rights Institute. p. 17.

⁵¹ Ibid p. 18.

⁵² Ibid. p. 18. Cited from 'Goulash Soup', *The Economist*, (Budapest, 7 April 2011), see: <www.economist.com/node/18530690> (last visited 10.04.2013).

⁵³ Ibid. p. 41.

⁵⁴ Ibid.

overload.⁵⁵ This does not sound like a preposterous idea in itself. It was further submitted that the National Council of Justice (NCJ) did not function well and did not succeed in improving the situation of the overloaded courts.⁵⁶ Again, in itself, not an unreasonable issue to wish to solve however, here too one must question the way in which the government pursued its aim. A further defence was presented arguing that, by retiring so many judges, the government was providing career opportunities for the next generation of judges.⁵⁷ This does not justify a direct infringement of EU Directive 2000/78/EC which prohibits any discrimination on the grounds of age.⁵⁸ As established by case law, it is contrary to EU law to adopt a particular retirement age which affects only one group unless an objective and proportionate justification is provided – this can be seen in *Reinhard Prigge and Others v Deutsche Lufthansa AG*.⁵⁹ This move is particularly bewildering when one looks to the average retirement age across Europe and sees it is rising, and the Hungarian government had provided no objective or proportionate justification for the measure *after* having informed the Commission of its intent to *raise* the retirement age.⁶⁰ Thus the move was solely a political, rather than legal, one.

Were their actions proportionate and really necessary? It is doubtful that there will be many, if any, valid arguments that would support the government's total disregard for the guarantee of judicial tenure (as required by international law - Article 12 UN Basic Principles on the Independence of the Judiciary⁶¹) and judicial independence. Individual points that have been submitted by the government as defences for measures taken may seem valid when looked at in isolation and one cannot fault several of the alleged aims to move forward and away from the past and to bring about a new, freer national identity. However, one must ask: has the government gone about their aims in the correct way? It would seem that there is no other possible answer than to say no, in light of the evidence presented and the way in which the government set about bringing in a new constitution, despite its legitimate wish to move away from its communist past, this was not done in the correct, or acceptable, way and it is no wonder that waves of worry are rippling around the EU and wider international circles. Kim Lane Scheppele phrases the problem well in her New York Times blog: "if constitutions are supposed to guarantee checks on political power and ensure the rights of citizens, this is an unconstitutional constitution."⁶²

4. *Is this a Problem for the European Union?*

When discussing the case at hand and the EU action against Hungary (which will be discussed later), it is useful to bear in mind the principles by which the judges of the European Court of Justice will abide. In the Preamble of the Treaty on European Union (TEU), we see the basic principles outlined – '...universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.' In order for democracy to flourish, there must be a separation of powers stemming from constitutional provisions which ensure a

⁵⁵ *Ibid.* p. 25.

⁵⁶ *Ibid.* p. 28.

⁵⁷ *Ibid.* p. 35.

⁵⁸ Directive 2000/78/EC.

⁵⁹ Case C-447/09 Reinhard Prigge and Others v Deutsche Lufthansa AG [2011].

⁶⁰ European Commission.

⁶¹ UN Basic Principles on the Independence of the Judiciary.

⁶² K.L. Scheppele, 'The Unconstitutional Constitution,' blog in New York Times, available at <http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/> (last visited on 05.12.2012).

limitation to the powers of the government.⁶³ ‘Respect for basic values and human rights, tolerance, peaceful and regulated transfer of power and legitimacy of the state’⁶⁴ are all essential to ensuring democracy. When looking at Hungary’s place in the EU, one may look to the Presidency Conclusions of the Copenhagen European Council, 21-22 June 1993, and wonder if Hungary would be allowed to accede to the Union under the current situation: ‘Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.’⁶⁵ When we compare the moves of the Hungarian government to these principles, we see almost immediately that it has ignored these basic common values of European Member States. Human rights have been disrespected – how is one to be sure he/she will get the fair and impartial trial afforded by Article 6 ECHR when the judiciary is politically linked and independence is jeopardized? Where is the true democratic debate over the introduction of new legislation when the leading party has the power to introduce or change ‘cardinal laws,’ as they have done, with their two-thirds majority? Where is equality when the constitution allows for discrimination against LGBTI people?⁶⁶ Where is equality before the law when there are barriers standing in the way of access to the constitutional court?⁶⁷ Even freedom of speech is not guaranteed anymore due to the new media laws which give the power to a government agency to still the voices of critical radio stations or newspapers.⁶⁸ Is there really a separation of powers when the legislator exercises so much control over the judiciary? These are serious insults in the face of common European values and laws – without a shadow of a doubt something must be done – the question is, what *can* be done?

5. *What Can the EU Do?*

Since Maastricht in 1991, further European integration has been incorporated into the Treaties while a provision to ensure the principle of subsidiarity is respected was also included - although Member States do confer certain competences to the EU (Article 5 TEU). These competences are outlined in Articles 2-6 Treaty on the Functioning of the European Union (TFEU) and are categorized depending on if they are exclusive, shared, supportive or coordinating.⁶⁹ Article 4 TEU ensures that, where the Treaties do not provide for EU competence, the EU will refrain from acting. Article 4(2) TEU pledges to: ‘respect the

⁶³ The Norwegian Helsinki Committee Report, ‘Democracy at stake in Hungary: the Orbán government’s constitutional revolution’, p. 4, available at <http://www.statewatch.org/news/2012/mar/hungary-nhc-democracy-at-stake-in-hungary.pdf> (last visited 05.12.2012).

⁶⁴ Ibid.

⁶⁵ Presidency Conclusions of the Copenhagen European Council, 21-22 June 1993, available at http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf (last visited 14.04.2013).

⁶⁶ Amnesty International, ‘EU must press Hungary to respect human rights norms.’, available at <http://www.amnesty.org/en/news/eu-must-press-hungary-respect-human-rights-norms-2012-01-16> (last visited 14.04.2013).

‘LGBTI people in Hungary potentially face broad discrimination under the new Constitution, which defines a family as a unit “based on the marriage of a man and a woman, or linear blood relationship, or guardianship.” This restrictive definition of what constitutes a family discriminates against same-sex couples, and may prevent courts from extending the institution of marriage to them in the future,” said Nicola Duckworth.’

⁶⁷ Ibid.

‘A new law on Hungary’s Constitutional Court appears to diminish ordinary citizens’ right to legal remedy...

Citizens are now required to have legal representation to make a constitutional complaint, and judicial authorities have the discretion to levy a €1,700 fine against complainants who “abuse of [the] right to submit a petition”.’

⁶⁸ Ibid.

⁶⁹ Craig & De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, Oxford 2011) p. 75.

equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government...' Article 5 TEU further contains two leading principles of EU law – that of subsidiarity and proportionality. It is accepted and well established that the EU institutions *only* have competence in the areas agreed upon in the Treaties⁷⁰ however, the articles which are broadly formed have left some scope for interpretation by the European Court of Justice. There is a somewhat lengthy list of case law on the topic; in *Van Gend en Loos* 'a new legal order of international law for the benefit of which the states have limited their sovereign rights' was acknowledged.⁷¹ *Costa v. ENEL*⁷² followed reaffirming the supremacy of EU law over national law and other cases, including *Simmenthal II*⁷³ and *Marleasing*,⁷⁴ furthered the notion. While some accepted this readily, and even enshrined it into their own constitutions, this cannot be said for all. Several constitutional courts of Member States have made reservations regarding the supremacy of EU law and claim the concept lies within their own national constitutions rather than in the 'new legal order' itself.⁷⁵ In particular, the Central and Eastern European states saw powerful constitutional courts emerge once the grip of Communism was slackened enough to let them go.⁷⁶

Prior to acceding to the EU, the Hungarian Constitutional Court, confirmed its power by holding that Hungary had its own notion of the 'rule of law' and that the Commission Regulations on transitional measures (aimed at preventing speculative stock accumulation) which were to be transposed into national law, in the form of an Act on Measures Concerning Agricultural Surplus Stocks, enacted by Parliament on April 5 2004, were retroactive in nature.⁷⁷ The Regulations stipulated that, if stockpiling was to be discovered, fines would be imposed. It was argued that it would be in breach of the *vacatio legis* of 45 days if the President was to sign the law in. Article 2(1) (pre-January 2012) Constitution of the Republic of Hungary of 1949 enshrined the rule of law and thus legal certainty according to the Court; the Court had viewed the case from the perspective of national law being applied and has chosen to take no notice of the European element despite the fact that the rules which were struck down were indistinguishable from the transitional measures required by the EU in order for Hungary to accede.⁷⁸ This arguably shows that the Hungarian Court was holding its feet firmly on the ground while shouting loudly and clearly that it was up to the national court to decide on whether EU law complied with domestic law and, if not, that Hungarian law would prevail.⁷⁹ It is remarkable that, after the Court ruled the EU Regulation would have a retroactive effect, the Hungarian government was brought before the ECJ for laws with that very effect (as well as contravening an EU directive).

Article 17(1) TEU assigns the Commission as the guardian of the Treaties and places upon it the responsibility of ensuring Member State compliance.⁸⁰ Article 258 TFEU affords the Commission wide powers and discretion and states that:

⁷⁰ *Ibid.*, p. 73.

⁷¹ Case C-26/62NV *Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963].

⁷² Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964].

⁷³ Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA.* [1978].

⁷⁴ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA.* [1990].

⁷⁵ Albi, 'Supremacy of EC Law in the New Member States Bringing Parliaments into the Equation of Co-operative Constitutionalism', *European Constitutional Law Review*, 3 (2007), p. 1, available at <http://kar.kent.ac.uk/424/1/Supremacy_30OCT07DP.pdf> (last visited 14.04.2013).

⁷⁶ Craig & De Burca, p. 296.

⁷⁷ Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe*, (Oxford University Press, Oxford 2012), p. 112.

⁷⁸ *Ibid.*, p. 112.

⁷⁹ *Ibid.*, p. 116.

⁸⁰ Craig & De Burca. P. 408.

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Outlined very briefly, the infringement procedure is divided into four steps; i) the Commission gives the Member State the chance to explain its actions (or lack thereof), ii) when still unclear, the state will be sent a formal notification by letter outlining the allegations it faces – there is a chance for the state to reply, iii) when the matter is unresolved by communication between the two, a reasoned opinion is issued, a timeframe by which the state must comply is set, and finally iv) the matter is referred to the ECJ when still unresolved. It is exactly this procedure the Commission used to bring Hungary before the ECJ on June 7 2012. However, the case honed in on one very particular issue, namely the ‘failure of a Member State to fulfil obligations’ under Directive 2000/78/EC – Articles 2 and 6(1). The ECJ, in its ruling of November 6 2012, found that Hungary provided no ‘evidence to enable it to be established that more lenient provisions would not have made it possible to achieve the objective at issue’⁸¹ and did not justify why it lowered the retirement age with such immediate effect.⁸² The Court further ruled that the ‘contested national provisions give rise to a difference in treatment which does not comply with the principle of proportionality and, therefore, the Commission’s action must be upheld.’⁸³ Thus the Court:

Declares that by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

6. Conclusion

The ECJ ruling is of course encouraging but there are many issues left unresolved. This said, it must be asked: is the independence (or lack thereof) of the Hungarian judiciary an *EU* problem? What about NATO? Human Rights Watch rightly points out that NATO requires members to have a “functioning democratic political system” and to respect common values of “individual liberty, democracy, human rights and the rule of law.”⁸⁴ In light of the issues discussed in this paper, it would appear that Hungary does not live up to these requirements as things stand. What about the flouting of democratic principles and the lack of public consultation when bringing about such wide sweeping laws? What about the human rights issues under Article 6 ECHR? Media restrictions, lack of the possibility of a fair trial before an impartial tribunal, freedom of association,⁸⁵ laws being enacted with retroactive effect – does this not smack of the beginnings of Nazi Germany? This is a provocative question indeed but one which is warranted. The situation in Hungary at the present time is

⁸¹ Case C-286/12 *Commission v Hungary* [2012]. §71.

⁸² Case C-286/12 *Commission v Hungary* [2012]. §73.

⁸³ Case C-286/12 *Commission v Hungary* [2012]. §80.

⁸⁴ Human Right Watch, available at <<http://www.hrw.org/news/2012/01/06/hungary-reverse-interference-courts-media>> (last visited 14.04.2013).

⁸⁵ International Bar Association’s Human Rights Institute. p. 19.

unacceptable in a European Union that purports to uphold democratic values - there is more that can be done. 'Europe's politicians must finally have the courage to openly criticize Hungary's government and to increase political pressure on the country with all the means they have at their disposal. Nothing less than the protection of European values is at stake.'⁸⁶ Finally, the EU should bring further infringement procedures and use every tool at their disposal to put an end to 'democracy being trampled on.'⁸⁷

In order for democracy to flourish, there must be a separation of powers stemming from constitutional provisions which ensure a limitation to the powers of the government.⁸⁸ 'Respect for basic values and human rights, tolerance, peaceful and regulated transfer of power and legitimacy of the state'⁸⁹ are all essential to ensuring democracy. As the situation stands, Hungary cannot be seen to be respecting the principle of the *trias politica* which Montesquieu found so vital for democracy. The government shows utter disrespect for the views of the Constitutional Court and flouts its independent control, undermining its judgements⁹⁰ evidenced by the introduction of laws which effectively overrules the Court. There is little in the way to show that the government takes popular opinion into account.

⁸⁶ Spiegel Online International, 'The World from Berlin: 'Democracy Is Being Trampled On in Hungary'', available at <<http://www.spiegel.de/international/europe/the-world-from-berlin-democracy-is-being-trampled-on-in-hungary-a-807138.html>> (last visited 14.04.2013). (Quoting the Financial Times Deutschland).

⁸⁷ Ibid.

⁸⁸ The Norwegian Helsinki Committee Report, 'Democracy at stake in Hungary: the Orbán government's constitutional revolution', p. 4, available at <<http://www.statewatch.org/news/2012/mar/hungary-nhc-democracy-at-stake-in-hungary.pdf>> (last visited 05.12.2012).

⁸⁹ Ibid.

⁹⁰ International Bar Association's Human Rights Institute. p. 40.

THE PRELIMINARY RULING PROCEDURE: DOES KÖBLER UNDERMINE CILFIT?

Caroline Calomme

1. Introduction

The Court of Justice of the European Union has developed the influential principles of direct effects and primacy of European Union law in cases referred to it through the preliminary ruling procedure.¹ Arguably the most significant procedural rule of the Treaty, it is laid down in Article 267 TFEU, previously Article 234 EC or Article 177 EEC.² This co-operative procedure ensures the uniform interpretation and application of EU law in the various Member States.³ Therefore, this mechanism secures the rule of law and equal treatment for all Union citizens.⁴ Furthermore, it facilitates the dialogue between the Court of Justice and the national courts.⁵ In 1982, the *CILFIT* case qualified the obligation for national courts of last instance to refer to the Court of Justice by granting discretion to the national courts if ‘the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt’.⁶ However, in 2003, the case of Professor *Köbler* extended state liability to breaches committed by judicial bodies, including the failure to make a reference to the Court.⁷ This controversial judgment raised many concerns analysed further in this paper. The main drawback of the ruling is the foreseeable increase in references in order to avoid liability in case of doubt, increasing significantly the already heavy workload of the Court.⁸ This paper enquires to which extent the *Köbler* judgment has indeed rendered *CILFIT* ineffective. For this purpose, the ruling in *CILFIT* is first examined and evaluated for its advantages and inconveniences. Second, the *Köbler* case is dealt with more extensively focusing on the current controversy surrounding it. Third, recent case law is presented in order to comprehend further the impact of *Köbler*. Finally, the paper assesses whether those judgments should be reviewed taking into account both the workload of the Court and the role of the rule of law.

¹ P. Craig & G. de Burca, *EU Law – Text, Cases and Materials*, (Oxford University Press, Oxford 2011), p. 442.

² Tridimas & Tridimas, ‘National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure’, 24 *International Review of Law and Economics* (2004), p. 127.

³ Arnall, ‘The Use and Abuse of Article 177 EEC’, 52 *The Modern Law Review* 5 (1989), p. 622.

⁴ Tridimas and Tridimas, 24 *International Review of Law and Economics* (2004), p. 127.

⁵ Bobek, ‘Learning to Talk: Preliminary rulings, the Courts of the new Member States and the Court of Justice’, 45 *Common Market Law Review* (2008), 2, available at <<http://papers.ssrn.com/>> (last visited 05.12.2012).

⁶ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3429, para. 16.

⁷ Komárek, ‘Inter-court constitutional dialogue after the enlargement – implications of the case of Professor Köbler’, 1 *Croatian Yearbook of European Law and Policy* (2005), 1, available at <www.cyelp.com> (last visited 05.12.2012).

⁸ Pfander, ‘Köbler v. Austria: Expositional Supremacy and Member State Liability’, *Illinois Public Law and Legal Theory Research Paper Series 06-14* (2006), 7, available at <<http://papers.ssrn.com/abstract=943787>> (last visited 05.12.2012).

2. *The Challenges of the Preliminary Ruling Procedure*

According to Art. 267(2) TFEU, the national courts have the discretion to decide whether or not to refer a question to the Court of Justice. However, the courts against whose decisions there is no judicial remedy, i.e. last instance courts, shall refer such question under Art. 267(3) TFEU. When a national court does so, this is communicated to the Member States, the Commission and the institutions concerned in order to give them an opportunity to comment on the issue. The answer results in a binding judgment but the facts of the case are left to the discretion of the referring court.⁹ Notably, the co-operation of national courts is a necessary condition for the functioning of this procedure.¹⁰ This is coherent as the courts of the Member States are part of the EU judiciary, without there being a formal hierarchy between the national and the European level.¹¹ On the one hand, the Court has an incentive to give private parties the possibility to challenge national law because it increases the possibilities for negative integration instead of having to rely on the governments or on the Commission in infringement cases.¹² On the other hand, it must face the practical impediments of an increased workload.¹³ Indeed, the preliminary procedure requires resources such as time, effort, and materials.¹⁴

From one reference in 1961 to 423 in 2011, it now represents half of the caseload.¹⁵ In view of easing the Court's task, the Court of First Instance was established in 1989.¹⁶ However, the issue remains that the number of judgments given is inferior to the oncoming judgments. This results, among others, in an increase of the length of the proceedings.¹⁷ The shortest duration reached in 2010 still amounted to 16.1 months.¹⁸ Therefore, it is in the interest of the Court that questions that do not require their time and effort are dealt with at the national level. An increase in references may also diminish the impact of the decisions. Moreover, it would disturb the distribution of powers between the Member States and the Union. It should also be kept in mind that the Amsterdam and Nice Treaties expanded the previous third pillar jurisdiction of the Court, enhancing the workload. On top of that, the recent enlargements will most likely bring more cases as well.¹⁹ To face this issue, Art. 104bis of the Rules of Procedure has already been revised as to allow for an accelerated procedure in urgent cases.²⁰ Next, we will see that the Court had already construed a solution to reduce its workload in 1982.²¹

⁹ Tridimas & Tridimas, 24 *International Review of Law and Economics* (2004), p. 129.

¹⁰ *Ibid.*, p. 134.

¹¹ Komárek, 'Federal Elements in the Community Judicial System: Building coherence in the Community legal order', 42 *Common Market Law Review* (2005), p. 10.

¹² Tridimas & Tridimas, 24 *International Review of Law and Economics* (2004), p. 137.

¹³ Wattel, 'Köbler, CILFIT and Welthgrove: We can't go on meeting like this', 41 *Common Market Law Review* (2004), p. 188.

¹⁴ Tridimas & Tridimas, 24 *International Review of Law and Economics* (2004), p. 135.

¹⁵ Statistics of the Court of Justice: Annual Report 2011. 'General activity of the Court of Justice – New cases, completed cases, cases pending (2007-11)', available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-03/ra2011_stat_cour_provisoire_en.pdf> (last visited 04.12.2012).

¹⁶ Tridimas & Tridimas, 24 *International Review of Law and Economics* (2004), 129.

¹⁷ *Ibid.*, 130

¹⁸ Court of Justice of the European Union, 'Press Release no 13/11' (2011), available at <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110013en.pdf>> (last visited 04.12.2012).

¹⁹ Batta, 'The relation between national courts and the European Court of Justice in the European Judicial System - preliminary ruling regimes according to Articles 234 EC, 68 EC, and 35 EU', *DG Ipol* (2007), 29.

²⁰ *Ibid.*, 30.

²¹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3417.

3. *CILFIT* – an Obvious Ruling?

In *CILFIT v. Ministry of Health*, the plaintiffs argued that custom duties imposed by Italian law breached the Regulation 827/68.²² Yet the Ministry of Health argued that there was no need to refer because the answer was obvious.²³ Thus the Italian Supreme Court asked for a preliminary ruling on whether the obligation contained in the Treaty was ‘conditional on the prior finding of a reasonable interpretative doubt’.²⁴ The theory of *acte clair* already existed in the French legal system and the discussion was whether this also applied to European law.²⁵ In its preliminary ruling, the Court held that the obligation for the highest courts to refer is waived if: (a) the question is irrelevant for the decision, (b) the question has already been interpreted by the Court (*acte éclairé*), or (c) the correct application is so obvious as to leave no scope for any reasonable doubt (*acte clair*).²⁶

Concerning the *acte éclairé*, it added that there might be no obligation to refer ‘even though the questions at issue are not strictly identical’.²⁷ Before determining that there is an *acte clair*, the matter must be ‘equally obvious’ to the other Member States.²⁸ Three factors must then be considered: (i) a comparison of the different versions of the EU legislation is necessary, as it is drafted in several languages that are all equally authentic, (ii) the EU peculiar terminology must be taken into account, and (iii) the context of the provision as whole is also relevant, particularly its objective and evolution in the light of the Treaty.²⁹ These qualifications given in *CILFIT* provoked different responses. Some authors supported the decision because it was coherent with the provision whereas others pointed out the risk it posed to the uniform application of the legislation in the Member States.³⁰

First of all, the *CILFIT* judgment was not unprecedented. Already in 1963, the *da Costa* case presented similar circumstances to *van Gend en Loos*.³¹ The Court ruled that there was no more duty to refer if the question was ‘materially identical with a question which has already been the subject of a preliminary ruling in a similar case’.³² In other terms, the obligation contained in the Treaty was held not to be absolute.³³ Furthermore, leaving more discretion to the Member States would ease the Court’s workload.³⁴ The legal scholar Rasmussen analysed *CILFIT* as a give-take judgment: it gave discretion to the Member States but only in exceptional cases. He proposed that rather than giving more discretion to the national courts, it encourages them to carefully scrutinize EU legislation and case law.³⁵ Therefore, the decision is a display of trust in the national courts, stressing the cooperative nature of the procedure, which still contains safeguards to maintain a uniform application as it has a limited impact.

²² Ibid.

²³ P. Craig & G. de Burca, *EU law*, p. 450.

²⁴ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3427, para. 4.

²⁵ Arnulf, 52 *The Modern Law Review* 5 (1989), 264.

²⁶ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3430, para. 21.

²⁷ Ibid, ECR 3429, para. 14.

²⁸ Ibid, ECR 3430, para. 16.

²⁹ Ibid, ECR 3430, para. 17–21. The criteria are repeated in the following articles: Arnulf, 52 *The Modern Law Review* 5 (1989), 625; Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 11.

³⁰ Arnulf, 52 *The Modern Law Review* 5 (1989), p. 626.

³¹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3429, para. 13. The link is also mentioned in Arnulf, 52 *The Modern Law Review* 5 (1989), p. 623.

³² Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR, para. 31, 38.

³³ Arnulf, 52 *The Modern Law Review* 5 (1989), p. 623.

³⁴ A. Sweet, *The Judicial Construction of Europe*, (Oxford University Press, Oxford 2004), p. 97.

³⁵ Arnulf, 52 *The Modern Law Review* 5 (1989), p. 627.

The *CILFIT* criteria have been repeated later on in more recent cases even after the *Köbler* judgment.³⁶ Nonetheless, the Advocate General Capotorti argued against the *acte clair* theory because it would increase the risk of subjectivity and uncertainty.³⁷ The test proposed in *CILFIT* for the *acte clair* has also been criticized for its difficulty.³⁸ The scholar Rasmussen qualified it as ‘unachievable’.³⁹ Even the Advocate General Jacobs and the Association of the Council of State and Supreme Administrative Jurisdictions of the EU noted that the conditions are too restrictive and that the language requirement is too much of a burden.⁴⁰ This constitutes an even greater issue for the new Member States, which must learn the *acquis* in a short period of time and might still have doubt as to the content of EU law.⁴¹

However, this did not prevent the national courts from making use of it, proving the risk of misapplication due to the lack of control of the Court. For example, the Conseil d’Etat in France has invoked the doctrine of *acte clair* 191 times between 1978 and 2001.⁴² The Czech and Polish Courts made use of the doctrine but merely included one sentence to examine it, indicating a lack of thorough analysis contrary to what the *CILFIT* test suggests.⁴³ Not to mention the German Constitutional Court going as far as to ignore the *CILFIT* criteria and apply its own.⁴⁴ As Arnall commented, this margin of discretion may be used to justify the refusal to refer when a Court has already formed an opinion on the interpretation, as it has been the case in England. Ironically, the Court decision would therefore serve the national courts in supporting a failure to obey EU law.⁴⁵

The conclusion drawn as to whether *Köbler* undermines *CILFIT* mainly depends on the view taken on the latter case. If this ruling indeed granted the Member States more discretion and allowed them not to refer as often as they had to in the past, then *Köbler* most likely undermines this. Yet the approach taken in this paper is the following: *CILFIT* clarified in details what had already been affirmed in *Da Costa* and it only allows discretion for last instance courts in some exceptional circumstances. This is also supported by the statistical data, which demonstrate that the amount of preliminary references did not necessarily decline after 1982.⁴⁶ Nonetheless, the *acte clair* criteria developed in *CILFIT* need improvement. A strict and literal application of the *CILFIT* criteria for the *acte clair* would have negative effects. For example, lawyers could delay proceedings by raising the questions and abuse the system. Moreover, this is rendered even more difficult due to the new enlargements and the increase of languages to take into account for the comparison.⁴⁷

From a realistic perspective, the Courts cannot possibly answer all the questions if the criteria were to be strictly followed. This is why, there have been propositions to word the provision in a less restrictive manner, e.g. an obligation to refer if it is of sufficient importance and there is a reasonable doubt. Unfortunately, the Intergovernmental Conference that took place in

³⁶ Cases where the criteria have been repeated: Case 99/00 *Lyckeskog* [2002] ECR I- 4839; Case 495/03, *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I- 08151.

³⁷ Arnall, 52 *The Modern Law Review* 5 (1989), 624.

³⁸ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 11.

³⁹ Rasmussen, ‘The European Court’s *Acte Clair* Strategy in *C.I.L.F.I.T.*’, 9 *European Law Review* (1984), p. 242.

⁴⁰ P. Craig & G. de Burca, *EU law*, p. 458.

⁴¹ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 12.

⁴² *Ibid.*, 11-12.

⁴³ Bobek, 45 *Common Market Law Review* (2008), p. 16.

⁴⁴ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 12.

⁴⁵ Arnall, 52 *The Modern Law Review* 5 (1989), p. 637.

⁴⁶ Statistics of the Court of Justice: Annual Report 2011.

⁴⁷ Batta, ‘The relation between national courts and the European Court of Justice in the European Judicial System - preliminary ruling regimes according to Articles 234 EC, 68 EC, and 35 EU’, *DG Ipól* (2007), p. 16.

Nice in 2000 was unable to find an agreement on this topic and the modification failed.⁴⁸ Strikingly, the Member States themselves did not reach a compromise to relax the criteria. However, the Member States agreed upon the Reflection Group's proposal to give the Court of First Instance jurisdiction in some circumstances.⁴⁹ Another alternative proposed by Rasmussen is the possibility of a *CILFIT II* case determining the line between the cases that need to be referred and those that do not.⁵⁰

4. *The Facts and the Ruling in Köbler*

The University Professor Mr Köbler was refused an Austrian length-of-service increment because the years he had worked in a university in Germany did not count.⁵¹ He claimed that the decision constituted indirect discrimination.⁵² Eventually, his appeal reached the Austrian Supreme Administrative Court, which referred the question to the Court of Justice.⁵³ The Registrar of the Court then informed the judges that a similar issue had already been resolved in *Schöning-Kougebetopoulou* and asked whether they wanted to withdraw the reference.⁵⁴ It supported Köbler's claim as it held that those years of work of equal value performed in another Member State should also be taken into account to calculate the length of service.⁵⁵ The Austrian Court withdrew the reference but surprisingly ruled against the professor on the grounds that the increment was not a length-of-service bonus but a loyalty bonus.⁵⁶ Consequently, Mr Köbler claimed reparation because of the loss suffered as a result of a breach of EU law.⁵⁷

Since there had never been such a procedure in the past, the Regional Court asked the Court of Justice whether a Member State could be held liable for an act of its supreme court, what would be the conditions for such liability and whether this applied in the present case.⁵⁸ The Court repeated the *Francovich* requirements to establish state liability:⁵⁹ the individual must be conferred a right, there must be a sufficiently serious breach and there must be a link between the breach and the damage.⁶⁰ It held that there is a serious breach if 'the decision [of a national court] concerned was made in a manifest breach of the case-law of the Court in the matter.'⁶¹ It concluded that the Austrian court had breached its preliminary procedure duty as to be interpreted based on the *CILFIT* test and on the provisions for the free movement of workers.⁶² In fact, if the case law did not provide more information about loyalty bonus, they should have maintained the preliminary reference. Despite this extension of state liability, it also specified that the breach was due to an incorrect reading of the judgment and did not amount to a manifest breach.⁶³ Therefore, Mr Köbler did not win his case but the ruling established State liability for judicial breaches of EU law regardless of the opposition of

⁴⁸ *Ibid.*, p. 17.

⁴⁹ D. Anderson & M. Demetrou, *References to the European Court*, (Sweet & Maxwell, 2002), pp. 17-20.

⁵⁰ P. Craig & G. de Burca, p. 458.

⁵¹ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 3.

⁵² Case 224/01 *Gerhard Köbler v. Austria* [2003] ECR I-10294, para. 6.

⁵³ Case 224/01 *Gerhard Köbler v. Austria* [2003] ECR I-10295, para. 7.

⁵⁴ *Ibid.*, ECR I-10295, para. 8.

⁵⁵ *Ibid.*, ECR I-10295, para. 9.

⁵⁶ *Ibid.*, ECR I-10295, para. 10.

⁵⁷ *Ibid.*, ECR I-10297, para. 12.

⁵⁸ *Ibid.*, ECR I-10298, para. 14. The comment on the legal questions can be found in Komárek, 42 *Common Market Law Review* (2005), p. 12.

⁵⁹ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 1.

⁶⁰ Case 224/01 *Gerhard Köbler v. Austria* [2003] ECR I-10310, para. 51.

⁶¹ *Ibid.*, ECR I-10312, para. 56.

⁶² Case 224/01 *Gerhard Köbler v. Austria* [2003] ECR I-10328, pp. 118-119.

⁶³ *Ibid.*, ECR I-10329, para. 123.

Germany, the Netherlands, Austria, France, the United Kingdom and the Commission.⁶⁴

5. *The Köbler Controversy*

The disapproval of the Court's view is widespread and scholars raise various controversial issues. From a strictly legal point of view, the Court has established a high threshold for finding a 'sufficiently serious breach'. The Court listed a series of factors characterizing the breach such as whether the infringement was intentional and whether the error of law was excusable but it did not rely on them and limited the issue to whether there had been a manifest breach.⁶⁵ In addition to this debatable reasoning behind the application of the serious breach, the Court did not discuss the causality in more details, creating legal uncertainty.⁶⁶ Another repeated criticism is the weakness of the comparative argument stating that this principle of liability for judicial decisions has been adopted 'in one form or another' by most Member States. This statement generalizes the facts, relies on an improper analysis and comprises a long list of exceptions - only a minority of Member States actually recognizes the principle.⁶⁷ Actually, there is no written provision in the Treaties about state liability.⁶⁸ In case the commonality requirement it not fulfilled, then it does not constitute a source of EU law as prescribed in Article 288 TFEU.⁶⁹

At the national level, the literature reveals impartiality concerns: in order to avoid the obligation to rule on a higher court's judgment, the national courts will likely refer the question to the Court.⁷⁰ The judgment also threatens the principle of *res judicata*, disturbing legal certainty and the finality of decisions.⁷¹ In response to this, the Court qualifies it as only allowing damages and not necessarily reversing the decisions.⁷² However, this might still threaten the legitimacy of the decision that became final.⁷³ In addition, scholars argue that it creates a double standard between the Court of Justice and the national courts.⁷⁴ In *Bergaderm*, the Court stated that the conditions for liability may not differ between the State and the Community unless there are particular circumstances.⁷⁵ Pavlovic defends that errors in judgment of the Court should also impose liability on the Community and that the failure to create a mechanism would constitute a manifest infringement.⁷⁶

At the European level, this places the Court in a stronger position than before in controlling whether the Member States comply with EU law.⁷⁷ The judgment established a hierarchy between the Court of Justice and the national courts as it transformed it into a de facto appellate court.⁷⁸ This will affect the existing relationship between the courts and it might

⁶⁴ *Ibid*, ECR I-10300, para. 16-29.

⁶⁵ *Ibid*, ECR I-10311, para. 55-56.

⁶⁶ Komárek, 1 Croatian Yearbook of European Law and Policy (2005), p. 8.

⁶⁷ Komárek, 1 Croatian Yearbook of European Law and Policy (2005), p. 6.

⁶⁸ Yu, 'The Mysterious State Liability Doctrine of European Community: An Uncertainty Analysis', Master Thesis at Aarhus University (2006), p. 53.

⁶⁹ Pavlovic, 4 Croatian Yearbook of European Law and Policy (2008), p. 184.

⁷⁰ Komárek, 42 Common Market Law Review (2005), 15; Komárek, 1 Croatian Yearbook of European Law and Policy (2005), p. 14.

⁷¹ Komárek, 1 Croatian Yearbook of European Law and Policy (2005), p. 7.

⁷² Case 224/01 *Gerhard Köbler v. Austria* [2003] ECR I-10307, para. 39.

⁷³ Komárek, 1 Croatian Yearbook of European Law and Policy (2005), p. 7.

⁷⁴ *Ibid*, p. 5.

⁷⁵ Case 352/98 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [2000] ECR I-5291, para. 41.

⁷⁶ Pavlovic, 4 Croatian Yearbook of European Law and Policy (2008), p. 188.

⁷⁷ Pfander, Illinois Public Law and Legal Theory Research Paper Series 06-14 (2006), p. 7.

⁷⁸ Komárek, 1 Croatian Yearbook of European Law and Policy (2005), 14.

impede on the process of integration of EU law into the national legal orders.⁷⁹ In other words, it undermines the principle of sincere cooperation.⁸⁰ Indeed, instead of the previously envisaged horizontal relationship, the power to overrule the interpretation of the Supreme Court and to review the qualification of a question as *acte clair* transformed it into a hierarchical relationship.⁸¹ Last but not least, the Court will likely be faced with an overload of cases.⁸² Consequently, an increase of the questions referred will lead to higher costs.⁸³ Between 2004 and 2011, the number of references has already raised from 249 to 423.⁸⁴ From a procedural perspective, it may lead to references being sent back to the Member States on the grounds of obviousness under Art. 104(3) of the Rules of Procedure of the Court.⁸⁵ This is undesirable because it would offend the national courts as it implies that they do not know the case law of the Court sufficiently.⁸⁶ The disadvantage of *Köbler* is that despite the foreseeability of the issues it would lead to in terms of workload, the *CILFIT* criteria were not revised.⁸⁷

6. A Unanimous Opposition?

Despite the animosity of the literature opposing the *Köbler* judgment, several arguments propose that the ruling should be welcomed. Contrary to what the criticisms might suggest, the possibility of such a ruling had existed since the joint case of *Brasserie du Pecheur/Factortame III*. In this case, the court held that a Member State could be liable for a breach of EU law by any of its organs and that the state had to be viewed as a single entity based on principles of international law.⁸⁸ In addition, it had been envisaged by the Advocate General Léger as well as scholars, e.g. Toner's article 'Thinking the Unthinkable? State Liability for Judicial Acts after *Factortame (III)*'.⁸⁹ Yet *Köbler* was the first case where those predictions became real.⁹⁰

More than a mere warning, it equipped the Court with additional enforcement means. Indeed, the highest courts present a specific situation, as there is no remedy available to the parties to challenge their decision. Before *Köbler*, there were only two recourses available. The Commission could either publish the breach in its annual report on the application of EU law or it could start a procedure of infringement against the non-compliant state. However, the former did not prove very effective and the latter never occurred until *Commission v. Italy* in

⁷⁹ Pfander, Illinois Public Law and Legal Theory Research Paper Series 06-14 (2006), p. 11.

⁸⁰ Komárek, 42 *Common Market Law Review* (2005), p. 22.

⁸¹ Scott and Barber, 'State liability under *Francovich* for decisions of national courts', 120 *Law Quarterly Review* (2004), p. 406.

⁸² J. Komárek, *Creating a Quasi-federal Judicial System of the European Communities*, (Institute for European Law at Stockholm University – 54, 2006), pp. 49-50.

⁸³ Pavlovic, 'Some observations on the European Court of Justice's post-*Francovich* Jurisprudence', 4 *Croatian Yearbook of European Law and Policy* (2008), p. 188.

⁸⁴ Statistics of the Court of Justice: Annual Report 2011.

⁸⁵ Pfander, Illinois Public Law and Legal Theory Research Paper Series 06-14 (2006), p. 12.

⁸⁶ Jans, 'State liability and infringements attributable to national courts : a Dutch perspective on the *Köbler* case' in A. Kellermann (ed.), *The European Union : An Ongoing Process of Integration – Liber Amicorum*, (T.M.C Asser Instituut, 2004), p. 173.

⁸⁷ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 12.

⁸⁸ Joined Cases 46/93 and 48/93 *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. & others* [1996] ECR I- 1029, para. 32-34.

⁸⁹ AG Léger in Case 5/94 *R. v. Ministry of Agriculture, Fisheries&Food, ex parte Hedley Lomas* [1996] ECR I-2553, para. 114; Examples of journal articles predicting the principle are: Toner, 'Thinking the Unthinkable? State Liability for Judicial Acts after *Factortame (III)*' 17 *YBEL* (1997); Anagnostaras, 'The Principle of State Liability for Judicial Breaches: The Impact of European Community Law' 7 *EPL* (2001).

⁹⁰ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), p. 4.

2004.⁹¹ Moreover, it allows the Court to verify whether the national courts have implemented rulings given in earlier references.⁹² In fact, even though Professor Köbler did not win the case, the decision of the ECJ puts pressure on the Member States to conform to EU law.⁹³ The judgment installs an informal appellate procedure as questions wrongfully considered might be referred to the Court through the intermediary of the liability action.⁹⁴ Whereas the preliminary ruling depends on the willingness of the court to refer and the parties cannot request it, the liability action established in *Köbler* constitutes an indirect way to appeal to Court. The lower courts are more likely to refer and will probably even ask for an application of the facts in order to avoid to judge a higher court.⁹⁵ This way, the Court can review the substance as well as the decision of the national court to characterize a question as an *acte clair*.⁹⁶ Therefore, it appears that the stand taken by the Court could also be desirable.

7. Recent case law of the Court of Justice

Interestingly, at the same time, the Commission had started proceedings against Italy because of its persistent breach of Community law by its courts.⁹⁷ *Commission v. Italy* was the first infringement procedure dealing with courts decisions.⁹⁸ Similarly to *Köbler*, the Advocate General Geelhoed argued that the state is a single entity and emphasized that the decisions of the supreme courts cannot be corrected within the national system, which could lead to state liability.⁹⁹ However, the Court did not find an infringement on the basis of a judicial decision but on the grounds that the legislator did not amend the law such as to stop incorrect judicial practice.¹⁰⁰ According to Komárek, the ratio of both holdings was to promote the effectiveness of EU law in the light of the 2004 enlargement.¹⁰¹

Due to the high threshold of the manifest breach test, it would logically follow that a procedure with such low chances of success would not encourage individuals to litigate. Yet, regardless the lack of a manifest breach, the Court held in *Köbler* that the decision of the Austrian court stemmed from an incorrect interpretation of EU law.¹⁰² In addition to the political message it sent to Austria, it might also allow the claimant to ask for the increment he was refused.¹⁰³ Indeed, this has become possible based on strict conditions established in *Kuhne & Heitz* in 2004.¹⁰⁴ The issue revolved around the classification of exported products as chicken legs. In the judgment *Voogd Vleesimport*, the Court confirmed Kuhne's position, who then requested the reimbursement of the money they were forced to pay due to the wrong interpretation.¹⁰⁵

The Court found that normally EU law does not force administrative courts to reopen final

⁹¹ *Ibid*, p. 3.

⁹² Pfander, Illinois Public Law and Legal Theory Research Paper Series 06-14 (2006), p. 7.

⁹³ *Ibid*, p. 12.

⁹⁴ Komárek, 42 *Common Market Law Review* (2005), p. 33.

⁹⁵ *Ibid*, p. 14.

⁹⁶ Scott and Barber, 120 *Law Quarterly Review* (2004), p. 406.

⁹⁷ Case 129/00 *Commission v. Italy* [2003] ECR I-4637.

⁹⁸ Komárek, 42 *Common Market Law Review* (2005), p. 11.

⁹⁹ Opinion of the AG Geelhoed in Case 129/00 *Commission v. Italy* [2003] ECR I-14653, 51-52; Case 129/00 *Commission v. Italy* [2003] ECR I-14657, para. 63.

¹⁰⁰ Case 129/00 *Commission v. Italy* [2003] ECR I – 14689, para. 41.

¹⁰¹ Komárek, 1 *Croatian Yearbook of European Law and Policy* (2005), pp. 2, 9.

¹⁰² Komárek, 42 *Common Market Law Review* (2005), p. 20.

¹⁰³ *Ibid*, p. 20.

¹⁰⁴ J. Komárek, *Creating a Quasi-federal Judicial System of the European Communities*, (Institute for European Law at Stockholm University – 54, 2006), p. 18.

¹⁰⁵ Case 453/00 *Kühne & Heitz* [2004] ECR I-864, para. 9.

decisions.¹⁰⁶ However, it is possible in a few exceptional circumstances.¹⁰⁷ First, national law must allow the court to reopen the decision. Second, the administrative decision must become final as the result of a judgment by a court of last instance. Third, it must appear from a subsequent decision of the Court that the judgment is based on a misinterpretation of EU law adopted without referring to the Court. Fourth, the plaintiff must complain to the administrative court immediately after becoming aware of the Court's decision.¹⁰⁸ This way, *Kuhne & Heitz* created other means to ensure the correct application of EU law.¹⁰⁹ Within this scheme, the damage litigation could provide the necessary Court interpretation to allow the reopening of the administrative decision.¹¹⁰ As far as *Köbler* is concerned, several authors support that he would fulfil those four requirements and receive his increment.¹¹¹

Finally, the principle developed in *Köbler* was reaffirmed in *Traghetti del Mediterraneo* in 2006.¹¹² This maritime transport undertaking argued that the Italian Supreme Court had misinterpreted aid rules and failed to refer to the Court.¹¹³ For this reason, the company brought a claim for damages against Italy but it failed because the national law limited state liability. In its ruling, the Court of Justice extended *Köbler* and extinguished the limitation to intentional fault and serious misconduct.¹¹⁴

Those three cases confirm Hartley's prediction of the Court's behaviour. He proposed that the judges first establish a general principle for a new doctrine without giving many precisions. Later on, they refine the principle based on the reactions to the newly introduced principle.¹¹⁵ As explained by Skouris, the President of the Court of Justice since 2003, *Köbler* safeguards the voluntary cooperation scheme of the preliminary procedure, giving a warning to the Member States not to exceed the *CILFIT* test.¹¹⁶ As a matter of fact, the German Federal Constitutional Court, the Italian Constitutional Court, the Spanish Constitutional Court, the Portuguese Constitutional Court and the French Constitutional Council have never referred to the Court of Justice up to 2004.¹¹⁷ Rather than undermining the *CILFIT* criteria, *Köbler* rather fortifies the exceptional character of the *acte clair* and consequently reveals once more the impracticalities of the criteria determining the obligation to refer.¹¹⁸

8 Conclusion

It is undeniable that the amount of questions referred to the Court of Justice has significantly increased since 2004. Nonetheless, it is a rhetorical mistake to assume that this higher number is solely caused by the *Köbler* judgment. In fact, other factors such as the introduction of

¹⁰⁶ *Ibid*, ECR I-868, para. 24.

¹⁰⁷ *Ibid*, ECR I-868, para. 25.

¹⁰⁸ *Ibid*, ECR I-868, para. 26.

¹⁰⁹ Nikolaou, 'From Francovich to Köbler and beyond: The evolution of a State liability regime for the European Community', Master thesis at the University of Helsinki (2005), p. 37.

¹¹⁰ Komárek, 42 *Common Market Law Review* (2005), p. 21.

¹¹¹ J. Komárek, *Creating a Quasi-federal Judicial System of the European Communities*, (Institute for European Law at Stockholm University – 54, 2006), pp. 28-30; Jans, 'State liability and infringements attributable to national courts: a Dutch perspective on the *Köbler* case' in A. Kellermann (ed.), *The European Union : An Ongoing Process of Integration – Liber Amicorum*, (T.M.C Asser Instituut, 2004), pp. 175-176.

¹¹² Pavlovic, 4 *Croatian Yearbook of European Law and Policy* (2008), p. 190.

¹¹³ Case 173/03 *Traghetti del Mediterraneo SpA (in liquidation) v Italy* [2006] I-5204, para. 2.

¹¹⁴ *Ibid*, para. 46.

¹¹⁵ Nikolaou, 'From Francovich to Köbler and beyond: The evolution of a State liability regime for the European Community', Master thesis at the University of Helsinki (2005), pp. 60-61.

¹¹⁶ *Ibid*, pp. 42-43.

¹¹⁷ Mavcic (editor of the proceedings), 'The position of the Constitutional Courts following integration into the European Union – International Conference Proceedings 2004', p. 154.

¹¹⁸ Batta, *DG Ipol* (2007), p. 21.

recent ambiguous regulations or the recent enlargements, mostly the accession of ten additional countries in 2004, could also have had a strong impact.

After all, if the national courts are indeed dealing with an *acte clair* and they decide not to refer, there is no reason why they will incur liability. *Köbler* as such does not introduce an unfair doctrine, even though its source as a general principle might be questionable. Moreover, the state will not incur liability in most cases, as the sufficiently serious breach threshold is so high that it is almost impossible to fulfil this requirement. On the contrary, the national court will be provided with the correct interpretation of EU law adding to legal certainty. Therefore, it appears that it serves more as a political tool for integration and application of EU law as a whole than as mechanism to ensure satisfaction for private individuals. Actually, *Kuhne & Heitz* still offers the possibility to ‘do right’ as long as this respects national law, both providing a remedy for the individuals and protecting the Member States’ sensitivity.

Due to the vehemence of the articles published, it seems that *Köbler* brought issues of sovereignty back to the surface. In other terms, it revealed the tensions between the Court of Justice and the national courts. The *Köbler* case created more opposition than the *CILFIT* case as the former rather punishes the Member States for misapplication of EU law whereas the Member States wished to interpret the latter as a broadening of their discretion. It also showed that the Member States are not always best equipped to judge on EU law matters. On the one hand, this may be caused by an insufficient education on EU law or deliberate policy choices. On the other hand, confusing case law and unclear legislation may contribute to those misunderstandings. The blurry line between the cases that should be referred and those that should not may also explain the errors made by national courts failing to refer. A *CILFIT II* or an addition to the ‘Information Note on the Preliminary rulings’ could partially solve this issue.

Overall, *Köbler* does not require revision, particularly not on the grounds that it undermines *CILFIT*. If there is a need for revision, it lies with the *CILFIT* criteria that should provide the Member States with clarifications and a reasonably achievable test. In the future, the Court of Justice shall find a balance between a heavy workload to ensure that the EU citizens may enjoy their EU rights despite national issues and the risk to affect the uniformity of application of EU law by delegating case law to the national courts. In the light of the controversy at hand, it is doubtful that case law will suffice to satisfy the Member States. Accordingly, a political solution should clarify the *CILFIT* criteria, hence, defining a clear limit of the competences of national courts and the Court of Justice.

THE PRELIMINARY RULING PROCEDURE: KÖBLER VERSUS CILFIT

Frederick Harker-Mortlock

1. Introduction

The case of *Gerhard Köbler v Republik Österreich*¹ established a new principle in the law of the European Union: courts of last instance of the respective EU Member States can, under certain conditions, be sued by individuals for damage caused to them as a result of a wrongful application of EU law. This judgment extended the general concept of Member State liability for breaches of EU law, first announced in *Francovich v Italy*,² but which up until *Köbler* did not apply to the courts of Member States. In the context of Article 267 TFEU, the judgment opens up the significant possibility that a breach of the obligation to refer, in particular in the circumstances laid down in *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*,³ will result in liability. However, this paper will argue that *Köbler*, far from bolstering Article 267 TFEU and *CILFIT*, may encourage, or at least may serve to perpetuate, the practical discretion which national courts have to diverge from *CILFIT* and Article 267 TFEU. Evincing both in theory and to some extent in practice, *Köbler* seems to have provided an inadequate mechanism for punishing divergence from *CILFIT*, and in doing so does nothing to address the problem of fragmentation of EU law, and the contravention of legal certainty.

2. Köbler

The very basis of *Köbler* liability is enumerated at paragraphs 51-52 of the judgment; a national court of last instance will be held liable for a breach of Community⁴ law if: i) The rule of law infringed is intended to confer rights on individuals; ii) The breach is sufficiently serious – the test being whether the Member State has manifestly and gravely disregarded the limits on its discretion; and iii) There is a direct causal link between the breach and the damage suffered.

All of these conditions are relevant to determining a breach of Article 267 TFEU.⁵ In terms of the first condition, this is no great obstacle to establishing liability, as it was ruled in *Köbler* that by its very nature paragraph 3 of Article 234 EC (267 TFEU) was intended to confer rights on individuals.⁶ The third condition is a standard causality test applicable to damage claims, and as such provides no special hurdle, even if it might be hard to prove that damage has actually been suffered in the context of a breach of Article 267 TFEU.⁷ The real heart of *Köbler* liability, in the sense of being the most complex and rigorous substantive condition to fulfill, is the second requirement. Any breach of Community law, including a breach of Article 267 TFEU, must be ‘sufficiently serious’. Being a condition aimed at restricting the

¹ Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

² Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.

³ Case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1983] ECR 341.

⁴ For the sake of brevity, this paper will refer to European Union law as Community law.

⁵ Also for the sake of brevity, references to Article 267 TFEU/234 EC will exclude the additional reference to paragraph (3) - when talking of the liability of national courts of last instance this is of course the specific paragraph of Article 267 TFEU/234 EC in question.

⁶ Case C-224/01 *Gerhard Köbler v Republik österreich*, para. 35.

⁷ This problem arose in *Köbler*, though it was not actively considered by the Court. See: Case C-224/01 *Gerhard Köbler v Republik österreich*, para. 97.

scope of claims against national courts of last instance, the Court ruled in *Köbler* that a breach will only be ‘sufficiently serious’ in the ‘exceptional case where the court has *manifestly* infringed the applicable law [emphasis added]’.⁸ There are a number of factors that must be taken into account when determining whether this has been the case, including the degree and clarity of the rule infringed, whether the infringement was intentional, whether the error was excusable or inexcusable, and various others – these are set out in paragraphs 55-56 of the judgment.⁹ In addition, regard must at all times be had to the specific nature of the judicial function, meaning *inter alia* the need to respect judicial independence, and to the legitimate requirements of legal certainty, connoting *inter alia* that judgments of courts of last instance must usually be accorded a degree of finality.¹⁰ These two conditions just mentioned seem to have been inserted by the ECJ in order to reinforce the point that damages can only be claimed when a breach by a court has been exceptionally serious.¹¹

3. *CILFIT*

In *Köbler*, one of the primary questions was whether the Austrian *Verwaltungsgerichtshof* had committed a ‘manifest’ infringement of what was then Article 48 EC. The ECJ came to the conclusion that Article 48 EC had not been ‘manifestly’ breached, one reason being that the correct answer to the specific question arising in relation to Article 48 EC, from which the Austrian court had deviated, was not to be found in any express provisions of Community law, including in the judgments of the ECJ, nor was the answer obvious.¹² Of course, given that the answer was, in the ECJ’s opinion, neither obvious nor evinced in precedent, a separate question arose as to whether the *Verwaltungsgerichtshof* had therefore breached Article 234 EC (267 TFEU), which, as stated in *CILFIT*, obliges a court of final instance to refer a question of interpretation of Community law for a preliminary ruling when the particular point of law has not been dealt with by the ECJ, or when the answer is not so obvious as to leave no scope for any reasonable doubt as to its application.¹³ Given its position on Article 48 EC, the Court ruled that there had indeed been a breach of Article 234 EC.¹⁴ However, what is significant is that the Court ruled that this breach of Article 234 EC was ‘not of such a nature as to invalidate the conclusion [that the breach of Article 48 EC had not been “manifest”]’.¹⁵ In other words, the breach of Article 234 EC, as per the breach of Article 48 EC, did not have the requisite ‘manifest’ character for liability under Community law.¹⁶ The reasoning behind this finding is perhaps the most crucial aspect of the Court’s judgment, for it indicates the conditions under which the Court regards infringements of Article 267

⁸ Case C-224/01 *Gerhard Köbler v Republik österreich*, para. 53.

⁹ *Ibid*, para. 55.

¹⁰ *Ibid*, para. 53.

¹¹ J.D. Campbell Jr, ‘Unenforceable Impracticality: Exploring Kobler’s Constitutional, Jurisprudential and Practical Miscues’, 38 (1), *Syracuse Journal of International Law and Commerce* (2010), p. 9, p. 12.

¹² Case C-224/01 *Gerhard Köbler v Republik österreich*, para. 122.

¹³ Case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, para. 14, 16.

¹⁴ Case C-224/01 *Gerhard Köbler v Republik österreich*, para. 118.

¹⁵ *Ibid*, para. 123.

¹⁶ If the breach of Article 234 EC had been ‘manifest’, we might assume that the Court would have identified it as such, and would have ruled that the breach of Article 48 EC had also been manifest. The general view in the scholarly community is that the Court considered the *Verwaltungsgerichtshof*’s breach of Article 234 EC, like the breach of Article 48 EC, not to have been ‘manifest’. See for instance J. H. Jans, ‘State Liability and Infringements Attributable to National Courts: A Dutch Perspective on the Köbler Case’, in De Zwaan, Jans, Nelissen, Blockmans (eds.), *The EU: An Ongoing Process of Integration*, (TMC Asser Press, 2004), p. 170. The English Court of Appeal also took this interpretation in *Stephen Cooper v Attorney General* (considered below).

TFEU as ‘manifest’, and therefore liable to result in a Member State court’s duty to compensate. In this case, there was no ‘manifest’ breach because the Austrian court’s decision not to refer was based upon an ‘incorrect reading’ of a point of law from a previous case, *Schöning-Kougebetopoulou*.¹⁷ Essentially, the Austrian court had seen an answer in the case law of the ECJ even though, in the opinion of the ECJ itself, there really was none.

The problem with the ECJ’s position is that it made no effort to consider the nature of the Austrian court’s ‘incorrect reading’. Rather than considering for instance whether the *Verwaltungsgerichtshof* may have *intentionally* misread *Schöning-Kougebetopoulou*, or rather than determining whether their reading may have been *unreasonable*, the Court simply stated that a misreading had taken place, implying that the breach of Article 234 EC was not therefore ‘manifest’ in nature.¹⁸

This judgment of the ECJ is both highly significant and deeply questionable when considered in the light of Article 267 TFEU and, in particular, the *CILFIT* criteria. The most obvious point is that the ECJ, when it implicitly ruled that the breach of Article 234 EC was not ‘manifest’, did not consider the criteria for a ‘manifest’ breach which it had itself set out in paragraphs 55-56, and which assumedly should be applied in all cases where a ‘manifest’ breach is at issue.¹⁹ In theory this sets a dangerous precedent, because national courts entrusted to determine the potential liability of courts of last instance for breaching Article 267 TFEU may also be encouraged to ignore these criteria, or to invent their own. In cases where a ‘manifest’ breach would have been found under the criteria at paragraphs 55-56 of *Köbler*, a national court may consequentially apply a looser standard, find that there has been no ‘manifest’ breach, and later reject the damages claim on the basis of this. This may in turn encourage courts of last instance to interpret precedent in a way inconsistent with *CILFIT*, ruling on novel points of law under the guise of merely disposing of questions already resolved by the ECJ, and knowing that under the looser standards they will not be punished for it. Furthermore, a loose standard adopted in relation to punishing misinterpretations of precedent may well translate into a loose standard when it comes to punishing breaches of the *acte clair* doctrine. Even where an interpretation of Community law is not so obvious as to be beyond reasonable doubt, and where a court of last instance nonetheless interprets the Community law without referring to the ECJ, its breach may not be deemed sufficiently ‘manifest’ to imply damages, though this would have been the case under the criteria at paragraphs 55-56 of *Köbler*.

4. Theory and Practice: *Stephen Cooper v Attorney General*

Although the above implications may seem rather theoretical, there is empirical evidence, in the form of the English case of *Stephen Cooper v Attorney General*²⁰ - one of the only cases in which a question of *Köbler* liability has arisen before a national court²¹ - which suggests that the theory may well be playing out in practice.

Before coming to the Court of Appeal in *Stephen Cooper v Attorney General*, a potential case of *Köbler* liability had been considered by the High Court in *Stephen Cooper v HM Attorney General*.²² This case centred around, *inter alia*, potential liability of the Court of Appeal for

¹⁷ Case C-224/01 Gerhard Köbler v Republik österreich, para. 123.

¹⁸ Campbell notes that the Court spent ‘a mere three sentences articulating the application of the serious [manifest] breach analysis to the facts of the case’. J.D. Campbell Jr, 38 (1) *Syracuse Journal of International Law and Commerce* (2010), p. 12.

¹⁹ Case C-224/01 Gerhard Köbler v Republik österreich, para. 123.

²⁰ *Stephen Cooper v Attorney General* [2010] EWCA Civ 464.

²¹ See the comment in *Stephen Cooper v Attorney General*, para. 64.

²² *Stephen Cooper v HM Attorney General* [2008] EWHC 2178.

breaching Article 267 TFEU in its decision in *R v London Borough of Hammersmith and Fulham*.²³ As the High Court found no liability, and as this decision was appealed, the Court of Appeal ended up having to consider potential liability for one of its own previous decisions. The significant aspect of the *Stephen Cooper* decision in terms of Article 267 TFEU is how the Court of Appeal responded to the ECJ's ruling in *Köbler*. First of all, it accepted the ECJ's finding that the Austrian *Verwaltungsgerichtshof* had wrongly interpreted precedent and had thereby breached Article 234 EC. Secondly, it recalled that the Austrian court was nonetheless not held liable (because the ECJ considered that there had been no 'manifest' breach).²⁴ Thirdly, and most importantly, it imbibed how the ECJ, in its finding that the Austrian court's misinterpretation of precedent did not amount to a 'manifest' breach of *CILFIT*/Article 234 EC, did not apply any objective criteria in its determination of why this was so – one criteria could have been the reasonableness of the Austrian court's (mis)interpretation, but the ECJ did not consider this: 'the Court of Justice did not ask whether its [the *Verwaltungsgerichtshof*'s] interpretation was reasonable or not.'²⁵ Evidently because the ECJ simply construed that the breach of *CILFIT*/Article 234 EC was not 'manifest', without providing any explanatory notes as to why – including potentially a consideration of the reasonableness of the interpretation, or indeed by making reference to the factors set out in paragraphs 55-56 of *Köbler*, the English Court created its own criteria for determining when a breach of Article 267 TFEU could be regarded as 'manifest':

'Accordingly, a failure to make a reference where a question is not *acte clair* does not automatically lead to *Köbler* liability, nor does the [wrongful] interpretation of prior case law result in the incurring of such liability, *unless there is an obvious answer and there are no other mitigating circumstances* [emphasis added].'²⁶

Unlike the ECJ, the Court of Appeal therefore seems to have brought an element of reasonableness into the 'manifest' breach equation; if it considers that the correct interpretation was 'obvious', but that the court in question nonetheless erred in its interpretation of precedent, then the breach of *CILFIT* will be 'manifest'. This has real practical significance, because if for instance a court of last instance in England had dealt with the case of Mr. Köbler in the same manner as the *Verwaltungsgerichtshof*, the Court of Appeal may well have held it liable if it transpired that the court's misreading of *Schöning-Kougebetopoulou* was 'obvious'. Of course, the meaning of the term 'obvious' is not clear, and it may be that the Court of Appeal envisaged a higher degree of culpability on the part of the erring court before construing liability than, for instance, if this court had made a merely "unreasonable" interpretation of a previous case. Thus, an application of *CILFIT* might appear unreasonable or even intentionally wrong, but the English courts could still consider that the correct application was not so 'obvious' as to hold the court liable for this unreasonable, or even intentionally incorrect, (mis)application. One might think, for instance, of a scenario in which an English court refuses to hold a court of last instance liable, even though this court paid no attention whatsoever to the detailed *CILFIT* criteria when it decided not to refer a question to the ECJ. This court of last instance may for instance have ruled that the matter was *acte clair*, despite not considering whether this would be equally obvious to the courts of the other member states, or comparing the different language versions of the Community law

²³ *R v London Borough of Hammersmith and Fulham exp. CPRE (London Branch)* [1999] C/OO/5240.

²⁴ *Stephen Cooper v Attorney General*, para. 72.

²⁵ *Ibid.*

²⁶ *Ibid.*

in question.²⁷ Because the ECJ in *Köbler* found no ‘manifest’ breach of *CILFIT*/Article 234 EC, despite neglecting to apply the criteria at paragraphs 55-56, it would probably be well within the domain of the reviewing English court to consider, in accordance with its own criteria, that such a blatant disregard of *CILFIT* was nonetheless not a ‘manifest’ breach, and thus not conducive to liability.

The scenario just mentioned is in fact exactly what transpired in the *Stephen Cooper* case. As discussed, the Court of Appeal was forced to consider liability for its own previous decision, made in the case *R v London Borough of Hammersmith and Fulham*. In this original decision, the court wrongly considered the meaning of a term in a Directive to be *acte clair* – specifically, the term ‘development consent’. What is most significant is that it came to this conclusion without any apparent consideration of the factors, set out in *CILFIT*, which must be taken into account before reaching any such conclusion. There was no effort to consider that this interpretation would ‘be equally obvious to the courts of the other Member States...’, to compare the different language versions of the Community legislation, to consider that ‘Community law uses terminology which is peculiar to it’, to be attentive to the fact that ‘legal concepts do not necessarily have the same meaning in Community law and in the law of the Member States’, nor to ensure that ‘every provision of Community law must be...interpreted in the light of the provisions of Community law as a whole.’²⁸ Rather, the judge, supported by the others, based his interpretation of ‘development consent’ on his own ideas of what could rightfully be seen as substantive “consent”, on ‘reasoning to like effect’ in a certain previous decision by the House of Lords, and upon his own conception that the wording of the Directive as a whole precluded the opposing interpretation.²⁹

Amazingly, despite this blatant disregard for *CILFIT*, the Court of Appeal ruled that the breach of this doctrine in the original decision did not constitute a ‘manifest’ breach of *CILFIT*/Article 267 TFEU. If the Court of Appeal had applied the criteria at paragraphs 55-56 of *Köbler*, it seems unlikely that they would have come to such a conclusion. However, instead of applying these criteria, the Court of Appeal invented its own: the breach could not have been ‘manifest’ because, *inter alia*, other courts and judges in England, including Lord Hoffman in the House of Lords, had interpreted ‘development consent’ in the same way that it had been interpreted in the original decision.³⁰ Failing to do such things as compare the different language versions of the Directive, as mandated by *CILFIT*, was irrelevant – there was no ‘manifest’ breach, and the court was not liable.

What this case may well demonstrate is the practical reality that *Köbler*, by ignoring the criteria for a ‘manifest’ breach set out in paragraphs 55-56 of the very same judgment, and by instead arbitrarily implying that the breach in that particular case of Article 234 EC/*CILFIT* had not been ‘manifest’, created the chance for national courts to invent their own criteria for determining when a breach of *CILFIT*/Article 267 TFEU is ‘manifest’. This may allow them, as in this case, to deny that a breach is ‘manifest’, even where this appears plainly untrue. The result, again at least in this case, is that liability is not construed, and thus the national court of last instance “gets away” with ignoring *CILFIT*. Overall, then, it might be said that *Köbler* may only serve to encourage, or at least to perpetuate, the discretion which national courts have, and which they seem to use on a not irregular basis,³¹ to diverge from *CILFIT*.

²⁷ These all being examples of factors that *CILFIT* has mandated a court of last instance consider before deciding that an issue is *acte clair*. See: Case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, paras. 16-20.

²⁸ Case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, para. 16-20.

²⁹ See *Stephen Cooper v HM Attorney General*, para. 57-63.

³⁰ See the other reasons at *Stephen Cooper v Attorney General*, para. 108-112.

³¹ There is much evidence to suggest that national courts of last instance have been rather cavalier when it comes to abiding by the *CILFIT* ruling; there are many cases of national courts not referring even where they

5. Final Observations

If *Köbler* has the potential to perpetuate the discretion which national courts of last instance have with regards to *CILFIT*, the question now turns to what sort of implications this might have for Community law. Although it is outside the scope of this paper to go into a deep analysis of this, the two most obvious points will be considered. First of all, *CILFIT* has an obvious role to play when it comes to maintaining the unity of Community law. If national courts of last instance are able to make a ruling on a question of Community law even where the answer has not been provided by the ECJ or is not clear beyond reasonable doubt, the courts of member states will, when desired, be enforcing their own interpretations of Community law.³² The obvious problem with this is that these interpretations may vary from member state to member state, and thus Community law will also vary as between the member states. Thus, Community law fragments along national lines, and once again there is a collection of European nation-states rather than European member-states. The second point relates to legal certainty. A discretionary use of *CILFIT* may make it uncertain as to whether *CILFIT* will apply in a particular case. This in turn increases uncertainty as to whether a novel question of Community law will, at the most advanced stage of legal proceedings, be resolved by the ECJ or by national courts of last instance – hence bringing into question the status of the ECJ as supreme interpreter of EU law, as mandated by the Treaties. It is in these two respects that *Köbler* appears to do nothing to enhance either the interests of Community law or the requirements of legal certainty, even if some legal scholars such as Breuer initially contended that it would do.³³

The final issue that must be considered is what a “*Köbler II*” or a “*CILFIT II*” might do to remedy the abovementioned problems. Given what has been said in relation to *Köbler*, perhaps the most obvious solution in relation to that case would be to emphasise the objective criteria to be applied in every determination of whether a breach of *CILFIT*, and thus of Article 267 TFEU, is ‘manifest’. Instead of opening up the possibility for national courts to develop their own criteria, as for instance the English Court of Appeal did in *Stephen Cooper*, the ECJ should specify the uniform and objective standard to be used; most obviously, the criteria set out in *Köbler* at paragraphs 55-56. All this would go some way to remedying the legacy of *Köbler* whereby national courts seem to have been left to their own devices when it comes to determining the criteria for evaluating whether a breach of *CILFIT*/267 TFEU is ‘manifest’. In terms of a “*CILFIT II*”, it is not within the scope of this analysis to consider whether the original *CILFIT* contains certain principles, particularly in regard to the determination of whether a certain interpretation of Community law is beyond reasonable doubt, that are somehow unreasonable or ill-conceived.³⁴ What is important, if Community law is to remain uniform and if legal certainty is to be ensured, is that national courts of last instance abide by the general obligations set out in *CILFIT* – that is, the obligation to refer when an interpretation is not *acte clair*, or when it has not previously been resolved by the ECJ. For this to happen, the appropriate test for ‘manifest’ breach of Article 267 TFEU, lacking annunciation in *Köbler*, must be clarified.

should have. See: N. Fenger & M. Broberg, ‘Finding Light in the Darkness: on the actual application of the *acte clair* doctrine’, 30 (1), *Yearbook of European Law* (2011), pp. 180-212.

³² Naturally, these courts could still *choose* to make a preliminary reference under Article 267 TFEU.

³³ See: M. Breuer, ‘State liability for judicial wrongs and Community law: the case of Gerhard Kobler v Austria’, 29 (2), *European Law Review* (2004), pp. 243-254, especially the concluding remarks.

³⁴ For example, the need to compare different language versions of the Community law in question.

LINGUISTIC DIVERSITY IN THE EU – IS A POLICY CHOICE THAT SUPPORTS 23 OFFICIAL LANGUAGES IN THE EU STILL DEFENDABLE IN A UNION OF 27 AND MAYBE EVEN MORE?

Ralf Manz

1. Introduction

The European Union has, in the course of its development, encountered many challenges in the past. A possible future or maybe even present challenge is ‘linguistic diversity’. There are currently 23 official languages in the EU and there is rising a discussion about this topic. Sometimes the situation of the Union is compared to Babel like experience, where people from different countries with different mother tongues come together and have to communicate.³⁵

This paper aims to give an illustration of the situation in the Union. It will first give an illustration about the languages in the EU, and make clear the distinction between official languages and working languages. After clarifying the linguistic situation, the positive and negative aspects of the linguistic diversity in the Union will be illustrated and finally the need of a single language in the Union will be discussed. This will be done under the leading question: Is a policy choice that supports 23 official languages in the EU still defendable in a Union of 27 and maybe even more?

2. Languages in the EU

Before dealing with the different languages in the EU it is important to clarify the term ‘linguistic diversity’. In fact there are several definitions of the term linguistic diversity that all deal with the input of different languages, the kinds of languages, their heritage and so forth. For the use of this paper linguistic diversity simply means: the more languages, the greater the diversity.³⁶ It refers to the languages spoken in the EU, in particular the official languages of the EU.

When dealing with languages in the EU one has to differentiate between official languages and co-official languages of the EU, as well as the languages of the member states. Currently the 48 states of Europe have 38 official languages, while in total there are about 240 indigenous languages spoken in Europe.³⁷ In total 27 of the 48 states are members of the EU. Languages in the member states can be official languages, co-official languages or unofficial languages, such as dialects spoken in certain areas of a country or other varieties of a specific

³⁵ Mamadouh, ‘Beyond nationalism: Three visions of the European Union and their implications for the linguistic regime of its institutions’, 48 *Geojournal*, p. 135,

³⁶ Skutnabb-Kagnas, ‘Why should linguistic diversity be maintained and supported in Europe? Some arguments, Guide for the Development of Language Education policies in Europe, From linguistic diversity to Plurilingual Education’, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), 8, available at <<http://www.coe.int/t/dg4/linguistic/Source/Skutnabb-KangasEN.pdf>> (last visited 05.12.2012); Durk, ‘Sustainable Development in a Diverse World (SUS.DIV) “Cultural diversity is an asset for human welfare and development” Benefits of linguistic diversity and multilingualism, Sustainable Development in a Diverse World Position of Research Paper 1.2,

2, available at <http://www.susdiv.org/uploadfiles/RT1.2_PP_Durk.pdf> (last visited 05.12.2012).

³⁷ Durk, Sustainable Development in a Diverse World Position of Research Paper 1.2, 4,

language.³⁸ In total we find about 63 languages, spoken as first languages, by people in the EU, plus some special cases. These first languages are not necessarily languages of European heritage.³⁹

In Article 55 TFEU it is implied that the official languages of the member states are also the official languages of the EU. The provision offers a list in which all these languages are enumerated. A copy of the Treaty, in the respective language, shall be given to each member state. The Article also mentions that all languages are 'equally authentic'.⁴⁰ Thus Art. 55 TFEU forms the basis for the official languages of the EU. This is extended by the first piece of legislation that was made by the EEC (European Economic Community), the predecessor of the EC (European Community) and later the EU.⁴¹ It was passed in 1958 as *Regulation No. 1* and will be further dealt with below.⁴²

The second paragraph of this Article 55 also indicates that there is a possibility to translate the Treaty into other languages. These languages do not enjoy official status in the EU. It only has official status in the respective country that demands the translation.⁴³ Thus there is the possibility to include co-official languages.

3. *Official Languages in the EU*

As already mentioned Art. 55 TFEU gives an outline of the official languages in the EU. It enumerates 23 languages, which all together form the official languages of the EU.⁴⁴ They represent the languages spoken in each Member State. As some states have the same official language, e.g. Germany and Austria (both have German as an official language), there are not 27 official languages of the EU.⁴⁵ However the 23 official languages represent the official language of the Member States, i.e. each Member State is fairly represented by the 23 official languages.

Article 55 TFEU should also be looked at in the context of *Regulation No. 1*. This regulation sets out the 'languages to be used by the European Economic Community'. Every Act of Accession amended the Regulation after each specific accession of a Country to the Community/Union.⁴⁶ Art. 1 of the regulation stipulates that the 23 languages are the official and the working languages of the institutions. One can refer to the institutions in any of these languages mentioned under Art. 1.⁴⁷ Regulations and other documents of general application

³⁸ Arbier Arzoz, *Respecting Linguistic Diversity in the European Union*, (John Benjamins Publishing 2008), p.63.

³⁹ Arbier Arzoz, *Respecting Linguistic Diversity in the European Union*, p.49.

⁴⁰ Art. 55(1) TFEU.

⁴¹ European Union, 'History of the European Union', available at <http://europa.eu/about-eu/eu-history/index_en.htm> (last visited 05.12.2012).

Bache, *Politics in the European Union*, (Oxford University Press, Oxford 2011).

⁴² European Commission, 'TRANSLATION, EU language legislation', available at <http://ec.europa.eu/dgs/translation/translating/legislation/index_en.htm> (last visited 05.12.2012).

⁴³ Art. 55(2) TFEU.

⁴⁴ Mowbray, 'Language in the UN and EU: Linguistic Diversity as a Challenge for Multilateralism', 8 *HeinOnline Law Journal* (2010), p. 96f, available at <<http://www.heinonline.org.ezproxy.ub.unimaas.nl/HOL/Page?page=91&handle=hein.journals%2Fnzjpubinl8&collection=journals>> (last visited 05.12.2012).

⁴⁵ European Commission, 'LANGUAGES, Official EU Languages', available at <http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm> (last visited 05.12.2012).

⁴⁶ Regulation No. 1

⁴⁷ *Ibid*, Art. 2.

shall be drafted in all official languages.⁴⁸ The same applies to the *Official Journal of the European Union*.⁴⁹

4. Co-official Languages

It is also important to mention the co-official languages of the EU, in order to obtain a complete picture of the languages used in the EU. This has also to do with several developments in the past.

Co-official languages occur when a state has more than one official language. Each country specifies which language it wants to have as an official language in the EU.⁵⁰ Thus when a country has more than one official language the other language will become a co-official language. An example is provided by Spain where next to *Castellano, el vasco, el catalán* and Galician are co-official languages of the country. In 2005 the co-official languages of Spain were used as working language in the EU institutions, e.g. Council discussions.⁵¹ In 2006 it also became possible to refer to the Ombudsman in the co-official languages of Spain.⁵² Thus it is possible for co-official languages to find their way into the EU. Nevertheless the languages will not be awarded the status of official languages. They will keep the co-official status, but play an important role in the processes of the EU. Another example that is similar to the Spanish inclusion of co-official languages is the granting of co-official status to Welsh in 2008, which led to the use of Welsh in EU institutions.⁵³

These examples illustrate that next to the 23 official languages of the EU co-official languages also play a crucial role in the every-day-business of the EU institutions. Recent developments also show that there is pressure to upgrade some of the co-official languages to official languages of the EU.⁵⁴ Thus the role of co-official languages is also important when considering the linguistic diversity of the European Union.

5. Use of Languages in the EU Institutions

Regulation No. 1 stipulates that the institutions themselves can determine in their own rules of procedure which languages are used in specific proceedings.⁵⁵ This means that not in every situation all official languages have to be used. But at the same time it opens the door for co-official languages to become part of the proceedings within the institutions.

One has to differentiate between the *official languages* of the Union and the *working languages*, which are the languages used in the every-day business of the institutions. The

⁴⁸ *Ibid*, Art. 4.

⁴⁹ *Ibid*, Art. 5.

⁵⁰ European Commission, 'TRANSLATION, EU language legislation', available at <http://ec.europa.eu/dgs/translation/translating/legislation/index_en.htm> (last visited 05.12.2012).

⁵¹ Rufino, 'Spain's co-official languages allowed in EU institutions' (*EUobserver*, 14 June 2005), available at <<http://euobserver.com/news/19323>> (last visited 05.12.2012)

⁵² Gadnesmann, 'Complaints to the Ombudsman now possible in any of the co-official languages in Spain' (*European Ombudsman*, 30 November 2006), available at <<http://www.ombudsman.europa.eu/release/en/2006-11-30a.htm>> (last visited 05.12.2012).

⁵³ Langlands-Brown, 'Welsh Language in the EU' (*European Commission*, 15 July 2008), available at <http://ec.europa.eu/unitedkingdom/about_us/office_in_wales/welsh_language_en.htm> (last visited 05.12.2012).

⁵⁴ EurActiv, 'MEPs push for the recognition of Catalan, Welsh languages' (*EurActiv*, 08 March 2012), available at <<http://www.euractiv.com/culture/meps-push-eu-recognition-catalan-welsh-languages-news-309487>> (last visited 05.12.2012).

⁵⁵ Regulation No.1; Art. 8.

official languages are used for communication of the EU institutions and the outside world, while the working languages are used for the work within the institutions themselves.

⁵⁶According to Art. 342 TFEU the Council shall, without prejudice to the Statute of the European Court of Justice, determine rules governing the languages of the institutions. In the light of Regulation No. 1 and Art. 342 TFEU, this means that different rules concerning the use of languages apply in the different institutions.

Each institution has the 23 official languages as its own respective official languages; however in some situations the working languages in the institutions have been altered and adopted to the specific needs in the institutions themselves.

The European Parliament's 23 official languages are at the same time the working languages of the Parliament. The same applies to the Council, ECOSOC and the committee of regions.⁵⁷ However in the Council there is a rising use of English and French, especially in oral communications.⁵⁸

In the Commission there is a significant difference between the oral and the written proceedings. While the written proceedings are mostly multilingual, the oral proceedings are dominated by the use of English, followed by French and German as working languages.⁵⁹ However in some situations the Commission is forced to apply all 23 official languages, for instance when it comes to the issuing of Regulations or other Acts of general application.⁶⁰

The ECJ, like the Commission, has restricted its working languages. The working language is solely French and one further language that is selected at the start of proceedings.⁶¹ The Court of Auditors however has English, French and German as a working language. Only English as a working language is used in the European Central Bank (ECB).⁶²

In the Council of Europe the whole situation is turned around. As the institution is assigned to be only bilingual, in practice many more languages are used.⁶³

A trend towards the mere use of only English and French can also be ascertained when considering the *European Patents Office*, which can only be applied to in English and French. English and French are the most used languages in the EU, but at the same time Germany wants to establish a firmer ground for the use of more German⁶⁴

What is however of crucial importance to mention when considering the working languages of the institutions, is the fact that there are no rules stating specifically which exact language is used as the working language in the EU. There are in fact no *official* working languages in

⁵⁶ Gazzola, 'Managing Multilingualism in the European Union: Language Policy Evaluation for the European Parliament', Volume 5 Issue 4 *Springer* (2006), p. 396, available at <http://link.springer.com/article/10.1007%2Fs10993-006-9032-5?LI=true> (last visited 05.12.2012).

⁵⁷ Gazzola, *Springer* (2006), p. 397

Mamadouh, 48 *Geojournal* (2000), p. 134.

⁵⁸ Strubell, 'Linguistic diversity: Which language model for Europe?', Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), 6

⁵⁹ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 8.

Gazzola, *Springer* (2006), p. 397.

European Commission, 'Traineeships Office' (*European Commission*, s.d.), available at http://ec.europa.eu/stages/information/faq_en.htm (last visited 05.12.2012).

⁶⁰ Regulation No. 1 Art. 4 and 5.

Mamadouh, 48 *Geojournal* (2000), p. 134.

Regulation No.1 Art. 4 and 5.

⁶¹ Gazzola, *Springer* (2006), p. 397.

Mamadouh, 48 *Geojournal* (2000), p. 134.

⁶² Gazzola, *Springer* (2006), p. 397.

⁶³ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 8.

⁶⁴ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 7.

the institutions. In fact every language can be a working language and most official languages are also used in the different institutions. The working languages just illustrate which language is preferred.⁶⁵ This is however changed when a special language is mentioned in the Rules of Procedure of one institution.

6. *Brightside of Linguistic Diversity – What Supports Linguistic Diversity in the European Union?*

Linguistic diversity is one of the most important cultural features of the EU.⁶⁶ It reflects the international flair the project has gained over the years and stands for diversity in general. Linguistic diversity makes it easy for every person to refer to the EU and its institutions⁶⁷, as there are no linguistic hurdles posed. One can say that communication profits from linguistic diversity because people are more likely to communicate and communication itself is facilitated.⁶⁸ This results in a better link between the EU and the European citizens.

What is definitely at stake here is a notion of *fairness*.⁶⁹ Fairness is something very important for the people; this is emphasized by Human Rights, for instance Article 22 of the Charter of Fundamental Rights of the EU, which constitutes that the Union should be anxious to support cultural diversity, including diversity. As at the moment, each state puts forward one official language of the EU no discussion is triggered about privileges of bigger or more important states because they are all fairly and equally represented.

The idea of fairness brings us to another positive factor of linguistic diversity, which has already been touched upon a little bit: the promotion of equality between the Member State of the Union. When talking about linguistic diversity in the EU one can say that there are three areas of special importance. First there is *democratic participation* of the members. When there is a restriction put upon the languages to use, this could result in an unfair amount of representation and by that lead to a reduction of political weight. Linguistic diversity thus supports democracy in the Union. Secondly there is the *equality* between the Member States themselves, which is somehow related to the third issue of *Prestige*. Linguistic diversity is something that promotes both because as soon as there is a restriction of languages, this infringes the equality of the Member States and damages their Prestige, as some states and their respective languages seem others.⁷⁰

Another aspect to be considered is the fact of facilitation for member states to get acquainted with the EU in general, when access of information is provided in their native language⁷¹

Summing up a general phrase that is very often used in this context refers to European Culture. The fact that every state contributes to the language of the EU leads to the

⁶⁵ Gazzola, *Springer* (2006), p. 397.

⁶⁶ Mamadouh, 48 *Geojournal* (2000), 133ff ; Commission, 'Europeans and their languages', Special Eurobarometer 243 (2006), 4f; Googlin, 'Linguistic Diversity and new minorities in Europe', Reference Study Universität Hamburg, Language Policy Division Council of Europe (2002), p. 5, available at <<http://www.coe.int/t/dg4/Linguistic/Source/GogolinEN.pdf>> (last visited 05.12.2012).

⁶⁷ For instance by a citizens initiative, more information available at <<http://ec.europa.eu/citizens-initiative/public/welcome>> (last visited 05.12.2012).

⁶⁸ Skutnabb-Kagnas, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), p. 16.

⁶⁹ Gazzola, *Springer* (2006), p. 394.

⁷⁰ Gazzola, *Springer* (2006), pp. 397ff.

⁷¹ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 5,

preservation so some kind of ‘cultural DNA’ of the Union, which might be lost when reducing linguistic diversity.⁷²

7. *Downside of Linguistic Diversity*

Unfortunately linguistic diversity does not only have positive but also negative aspects. It begins with the huge workload that the institutions have to deal with. As indicated above all Regulations or Acts of general application have to be published in all the official languages of the EU.⁷³ The same holds true for the Journal of the EU.⁷⁴ The translation of texts in 23 different languages is very sophisticated and requires a lot of resources.

First a lot of time is needed to translate such texts and the more extensive the text the more time-consuming the process is.⁷⁵ This may be very burdensome depending on the type of Act that is at stake. Secondly a working-staff is required to conduct the translation of the texts. As these are of a high importance and political matter, dealing with crucial topics in the Union the staff employed to carry out such tasks must be highly educated and reliable, as inaccurate translation may lead to a lot of problems. Finding such personal is one matter, but employing and paying them is the other. This brings us to a third problem, the financial and procedural costs that come up. The factors leading to these costs are various. These may be costs of employment, costs of providing material for the translation, costs of maintenance and several other factors.⁷⁶

Another problem arising in relation to translation is the vagueness of translation, which may in some cases be imprecise.⁷⁷ This may depend on the restricted vocabulary given in one language, the broadness of terms that may lead to different interpretations of the texts or mistakes made during the translation, as translation always includes an individual interpretation or comprehension of the text. Thus a text will be translated as the translator may interpret certain words, meanings and so on.

Efficiency suffers from the burden that is imposed by the equality of the languages of the Member States. The process of work is slowed down, especially in cases of translation.⁷⁸ One could provide information much faster without all the hurdles to take in order to provide information in all necessary languages.

Diversity can generally also be separated into two different topics – first there is education and second there is service and industry. Education and being in the position to speak several languages fluently is a very desirable one, referring to the present and to the future. This is supported by initiatives of the EU to trigger progress in this area, for instance by different programmes as LINGUA, SOCRATES and others.⁷⁹ In fact there is no downside in this area, as education and knowledge is always desirable. However the forced use of all these languages for some processes may be problematic.

⁷² Skutnabb-Kagnas, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), p. 14.

⁷³ Art. 4 Regulation No. 1.

⁷⁴ Art. 5 Regulation No. 1.

⁷⁵ Gazzola, *Springer* (2006), p. 399

⁷⁶ *Ibid.*, pp. 397ff.

⁷⁷ *Ibid.*, p. 405

Mamadouh, 48 *Geojournal* (2000), p. 135.

⁷⁸ Gazzola, *Springer* (2006), p. 399.

⁷⁹ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 5.

More information available at <<http://www.lingua-eu.de/de/>> (last visited 05.12.2012). or at <http://ec.europa.eu/education/lifelong-learning-programme/erasmus_de.htm> (last visited 05.12.2012).

On the other had the customisation of languages in the sector of services and industry is essential for firms to deal with their content, but also for other industries to deal with the huge volume of digital information. The customisation of information, supports partnerships and facilitates transactions between businesses.⁸⁰ This can also be seen in the context of competitiveness of the EU against other major economic powers, which is an aim set out in the Competitiveness Council and recognisable in many other projects.⁸¹ It can also be seen in the context of a better internal market, which is one of the main aims of the European Union.⁸² However linguistic diversity decelerates the process and efficiency, which may lead to disadvantages for the EU as too many hurdles may be imposed by the rules on linguistic diversity to for instance make quick decisions.

Summarizing the negative sides of linguistic diversity the reasoning is rather a pragmatic one.

⁸³ When considering the reduction of official languages of the EU this leads to a clash between equality or culture and efficiency or competitiveness. This relationship will be addressed in the next part of this paper.

8. *English as a Lingua Franca*

A lingua franca entails the idea that a language is used by non-native speakers for international communication between members of an international community.⁸⁴ The term usually depicts a common language ('*Pidgin-language*') that was used for commerce in the western Mediterranean until the 19th century. It was based on a mix of the most popular languages at that time.⁸⁵ An example of a lingua franca in modern times is English. Whether English would be an appropriate lingua franca for the EU as well depends on several factors, like the actual use of English in the Union and its institutions, the number of people being able to speak and understand English, in regard to the staff and the Union citizens, as well as other factors.

In the past Georges Lüdi established that English is used by the Swiss to communicate when they speak different languages. The same holds true for Norway, where relations between the government and companies, even Norwegian companies, were completely dealt with in English. This implies that the use of English is expanding and driven by engines in several sectors and places all over the world.⁸⁶ Consequentially the question is raised how long can this development be excluded from the EU or at least reduced?

⁸⁰ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 5

⁸¹ Council of the European Union, 'Competitiveness Council' (*Council of the European Union*), available at <<http://www.consilium.europa.eu/policies/council-configurations/competitiveness.aspx?lang=en>> (last visited 05.12.2012); more information about the Council are available at <http://www.compete.org/images/uploads/File/PDF%20Files/CoC_CompAgenda_111008.pdf> (last visited 05.12.2012).

⁸² Art. 3 TEU.

⁸³ Gazzola, *Springer* (2006), p. 399.

⁸⁴ Fiedler, 'Approaches for fair linguistic communication', 2.1 *European Journal of Language Policy* (2010), pp. 6ff, available at <<http://de.scribd.com/doc/35515178/Fiedler-Approaches-to-Fair-Linguistic-Communication>> (last visited 05.12.2012).

⁸⁵ Institut für Interkulturelle Kompetenz & Didaktik, 'Lingua Franca', available at <<http://www.ikud.de/Lingua-Franca.html>> (last visited 05.12.2012).

Oxford Dictionaries, 'lingua Franca' (*Oxford Dictionaries*), available at <<http://oxforddictionaries.com/definition/english/lingua%2Bfranca>> (last visited 05.12.2012).

⁸⁶ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 6.

Taking into consideration the amount of English used in the Union, one can see a growing use of English in relation to other languages. As indicated above many institutions reduced their working language to English only, or they included French and German. However it is obvious that for communication purposes English is the most important and mostly used language.⁸⁷ This has to do with the fact that there is a general growing use of English, including high proficiency fields. Furthermore there is a growing use of English as second language.⁸⁸ The ability to understand and speak English has advanced in the past, and will even grow in the future.⁸⁹ English is the most widely spread language in the whole world and used for communication all over the planet. It is the main language of science and technology and plays a crucial role in the process of globalization.⁹⁰ This has led to the approach of English as a lingua franca (ELF), next to the English as a native language (ENL).⁹¹ To understand the situation a short inside is needed of how the states today see the situation. The Danes for example when negotiating as accession to the EU advocated a language regime in which the focus was on English and French, similar to the work of the Council.⁹² Larger states on the other hand tend to demand a representation of their language on an European level, as both an official and a working language.⁹³

9. Does the Union Need a Lingua Franca?

The discussion about the actual need of a lingua franca can be nicely introduced by a quote of Heinz Kloss in a proposal on European diversity:

In the unification of Europe, which is the wish of us all, we have to perform two completely different tasks: we have to improve the possibilities of oral and written comprehension between the language communities of Europe, and we have to prevent medium-sized and small language communities from being consciously or unconsciously discriminated and damaged in that unification.⁹⁴

In order to be fully able to discuss this topic a few things need to be repeated. First we need to consider the arguments put forward for and against linguistic diversity. Secondly we need to figure out the difference between the real-life situation, with different official and working languages. Finally the concept of a lingua franca should be kept in mind. We considered the costs of the linguistic diversity as a negative side. However in order to be able to judge the costs one needs to see the costs in relation to something else, thus a cost-benefit analysis should be made.⁹⁵ The costs of linguistic diversity in the EU have steadily been rising from

⁸⁷ Mowbray, 8 *HeinOnline Law Journal* (2010), p. 97.

⁸⁸ Mamadouh, 48 *Geojournal* (2000), p. 134.

⁸⁹ Skutnabb-Kagnas, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), p. 17

⁹⁰ Durk, Sustainable Development in a Diverse World Position of Research Paper 1.2, 7, available at <http://www.susdiv.org/uploadfiles/RT1.2_PP_Durk.pdf> (last visited 05.12.2012).

⁹¹ Seidlhofer, 'English as Lingua Franca', 59/4 *ELT Law Journal* (2005), pp. 339ff.

Seidlhofer, 'Research Perspectives on Teaching English as a Lingua Franca', 24 *Annual Review of Applied Linguistics* (2004).

⁹² Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 8.

⁹³ *Ibid.*, p.4.

⁹⁴ *Ibid.*, p.6f.

⁹⁵ Skutnabb-Kagnas, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), p. 15.

gazzola p. 394.

1999-2007. In 2007 the costs for linguistic diversity made up 1% of the total budget of the EU.

However costs cannot be only measured in relation to money but other factors play a crucial role too. People tend to communicate in their native language than in their second or third language.⁹⁶ This means that a reduction of languages may also lead to a decrease in communication. Another factor to be considered, especially in modern times, are the environmental costs.⁹⁷ Linguistic diversity includes a greater load of paperwork, production costs and so on. There may even be political costs caused by the reduction of languages, for instance for the European Parliament (EP). The EP is directly elected.⁹⁸

Two problems may arise in this context. The first problem is an ex post scenario in which a person is elected that does not speak the required working language or his language skills are not sufficient. The second problem concerns the situation before the election (ex ante). People may be prejudiced when making their preferences because of the language skills of the candidates, i.e. not the most suitable candidate will win, but the one showing fluency in the required language.⁹⁹ A last factor to be included is Human Rights. According to Art. 22 of the Charter of Fundamental Rights of the EU: *'the Union shall respect cultural, religious and linguistic diversity'*, which goes hand in hand with the notion of fairness. It is not fair to ask citizens to acquire knowledge in one specific language, just to be able to have access to information or communicate on a European level. Equality of people is infringed when the access to information is only given in one specific language, as only privileged people understanding the language will have access to the information provided. It should not be necessary for people to speak a certain language in order to acquire information they need.¹⁰⁰

What also needs to be considered is a possible shift of costs, which means that a reduction of linguistic diversity in the Union may reduce the costs for translation, salaries etc., but at the same time this can result in other costs like the need to educate people and support them in acquiring new or better language skills.¹⁰¹

The 'factors mentioned above have to be considered when drawing a conclusion to the essay question. Is the policy choice of 23 official languages of the EU still defensible at the moment and in the future? When considering the costs and the benefits of linguistic diversity mentioned above the result somehow shows that no side actually outbalances the other and there is no argument standing out on one side. Therefore one can conclude that the costs are quite reasonable in the light of the aims that are to be achieved.

So should there be any changes? From a democratic point of view the answer is *no* because no state in the EU should be more or less privileged than another state. This goes hand in hand with the Charter of Fundamental Rights. However, there should be a difference made between the symbolic official languages of the EU and the working languages of the EU. The EU needs to be competitive and efficient. Rules on specific language requirements should be loosened, especially when considering the negative sides of linguistic diversity and the variation of costs. The question is in how far should these been loosened. It is already recognisable in the current structures of the Union that there is a reduction of languages used. It is however crucial to keep the publications in the official languages when it comes to acts of general application and so on. The important aspect is, the more people are influenced,

⁹⁶ Skutnabb-Kagnas, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), pp. 16ff.

⁹⁷ Skutnabb-Kagnas, Reference Study Language Policy Division Directorate of School, Out-of School and Higher Education, Council of Europe (2002), pp. 15ff.

⁹⁸ Art. 14 TEU.

⁹⁹ Gazzola, *Springer* (2006), p. 404.

¹⁰⁰ Strubell, Paper prepared for the symposium *Cultural Diversity and the Construction of Europe*, Universitat Oberta de Catalunya Barcelona (2000), p. 6.

¹⁰¹ Mamadouh, 48 *Geojournal* (2000), p. 135.

directly or indirectly the easier it should be for the people to get information about it, without prejudicing citizens with a lower degree of language skills. The work of institutions should due to efficiency reasons however be reduced and the use of 23 languages should not be of mandatory use. When the institutions deem it necessary to reduce the number of languages they should be able to do so, but at the same time they can also add languages to use in specific situations. The reduction of languages should however not be criticised for lack of democracy. The reasons for such decisions are not made with the intent to infringe with democracy, equality or the Prestige of the Members. The reasons are practical ones that aim to keep the Union competitive and functional. This is what is actually done in the Union. But there is still an influence of the big states recognisable. The limitation to one language only, in the respect English as a lingua franca should be supported to make even more progress.

So one can say, relating to the essay question, that the work of the Union is not as much impaired as one might think in the first place. There have been practical adjustments in the Union by limiting their working languages, which makes it still bearable for the Union to have 23 official languages. However the influence of the big states and their languages should be reduced and one should turn to a development that supports English as the only working language, which may be amended by other languages in special cases. The research in the area of English as Lingua Franca (ELF) may be helpful here and lead to a reduction of costs and other hurdles, without impairing essential elements. Due to the differentiation the Union can still keep the 23 official languages and should also stick to Article 4 and 5 of Regulation No.1 in order not to prejudice anyone, i.e. still keep special rules for the publication of acts in all official languages, as public interest here clearly outweighs the costs. A development in such a direction will make it possible to defend a policy with such a high number of official languages in the EU in the long term.

In order to conclude this paper one can quote Leonard Orban, a former Commissioner for multilingualism in the EU¹⁰²:

*[...], multilingualism has its own limits inside the European institutions and in publications. No matter how much we would like to, we cannot translate everything in all the 23 official languages. We are faced with constraints, depending on the human resources available and the budget allocated to translation. Legislation is translated into 23 official languages, but other documents [...] are translated only into the languages needed. At the same time, documents or sub-websites that are consulted only by a limited number of people do not need to be in all the official languages. The transience of information is another limit. Translation takes time, so we concentrate our resources on getting urgent information online in real time, in the languages understood by the largest number of European citizens, rather than on late publication in all languages.*¹⁰³

¹⁰² European Commission, 'The Commission' (*European Commission*), available at: <http://ec.europa.eu/archives/commission_2004-2009/index_en.htm> (last visited 05.12.2012).

¹⁰³ Javier, 'Multilingualism (Leonard Orban)', (*Europroyect*, 8 November 2008), available at <<http://eurolinguisticproyect.blogspot.nl/2008/11/multilingualism-leonard-orban.html>> (last visited 05.12.2012).

LINGUISTIC DIVERSITY AT WHAT COST: ARTICLE 55 TEU [TREATY OF THE EUROPEAN UNION] IN NEED OF REVISION?

Loyce Mrewa

1. Introduction

This paper will focus mainly on the legal-institutional aspects of maintaining linguistic diversity within the Union. The need and goals of multilingualism and linguistic diversity will also be assessed. Sociolinguistic aspects of this multilingualism within the Union will also be looked into where language diversity and its relation to society within most of the EU Member States are observed. The later part of the paper will focus on the policy analysis of the cost, effectiveness and justification of using all 23 official languages, the political issues associated with such diversity and the possible solutions to any problems resultant of maintaining diversity. The conclusion will focus on my own personal opinion of the best way forward, which would be either maintaining such multilingualism or to take action to amend treaties and other legal instruments enforcing such measures. My research question is What are the effects of linguistic diversity on EU citizens and the legal-institutional aspects associated with them?

2. The Need for Multilingualism within the EU

The principle of multilingualism is used as a tool to ensure the realization of goals such as equal accessibility and transparency of the EU institutions. This is evident in for instance Article 24 Treaty on the Functioning of the European Union (TFEU), where EU citizens can directly question the legality of acts of the EU institutions. As in the European Parliament (EP) using any of the *official* languages within Article 55 TEU and receive an answer in the same language.¹⁰⁴ This also allows for participative democracy within the Union where every EU citizen can challenge the Unions' actions as also within a Citizens initiative according to Article 24(1) TFEU. Equality of all Union languages also ensures political significance and prestige is maintained amongst the Member States which can be used to avoid the deadlocking of EU projects such as within the unitary patent protection system caused by Italy and Spain who eventually opted out.¹⁰⁵ Equality is also achieved via the promotion and safeguarding of each Member States' *cultural and linguistic diversity* protected within Article 22 of the European Charter of Fundamental Rights. The right to non-discrimination of language is also protected within Article 21 of the European Charter of Fundamental Rights; this Charter is binding within the EU according to Article 6 Treaty on the European Union (TEU). The respect and autonomy of linguistic diversity seems to be an essential value in EU policy within the EU and is also echoed in projects such as the European Year of languages (EYL).¹⁰⁶ The Commission in 2005 asserted this through its communication within *A New Framework Strategy for Multilingualism* whose main aims were to improve communication between EU citizens and EU institutions and explore ways of increasing multilingualism

¹⁰⁴ Article 24(2) Treaty on the Functioning of the European Union (TFEU).

¹⁰⁵ Europarl, 'EU patent final act', *Newsletter* - 2-5 July 2012 - *Strasbourg plenary session*, available at <<http://www.europarl.europa.eu/news/en/pressroom/content/20120621NEW47396/4/html/EU-patent-final-act>>, (last visited 05.12.2012).

¹⁰⁶ Decision No 1934/2000/EC OJ L 232, 14.9.2000 See Article 2 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:232:0001:0005:en:PDF> (last visited 05.12.2012).

within the EU.¹⁰⁷ Language within the framework was regarded as a ‘direct expression of culture’ and cultural integrity which are also protected in Article 22 of the European Charter of Fundamental Rights. The governments of the Member States also agreed to increase the individual multilingualism within their own respective countries by use of the *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006* project,¹⁰⁸ where EU citizens were expected to learn two other languages besides their mother tongue from an early age.¹⁰⁹ All these initiatives preserve the diversity within the Union whether cultural and or linguistic. The linguistic diversity also makes the free movement rights of EU citizens within Title IV TFEU possible, as communication barriers will be greatly reduced as a result of language learning implemented by measures such as *A New Framework Strategy for Multilingualism 2005*, *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006* and the *EYL 2001*.

3. *The Legal-Institutional Aspects*

The equality of languages of the Member States within the EU is in principle correct but might not be so in reality even though linguistic equality is protected in European regulations, treaties and decisions of the EU institutions. The status and importance of languages in principle can be divided into mere *treaty languages* and *official and working languages*.¹¹⁰ The institutions and all Member states of the Union are stipulated in Article 55 TEU to treat the translated texts of the treaty with ‘equal authentication’. The languages within Article 55 TEU and Article 24 TFEU can be regarded as treaty languages as they are the languages used in the translation of the treaties and for bringing a claim to the EU institutions, respectively, in a language mentioned in Article 55(1) TEU. The official and working languages of the EU are within Article 1 of Council Regulation No.1 which accords equal status to all the 23 languages of Member States within the Union as official and working languages.¹¹¹ In Article 342 TFEU these official and working languages of the EU institutions are determined by the Council acting unanimously by means of regulations, such as Regulation No.1, and without prejudice to the Statute of the Court of Justice.

Council Regulation No. 1 Article 6 states that: ‘*The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases*’. This alludes to the differential treatment between languages that are accorded status just as *official* languages and those that are used as *working* languages within the institutions. This violates the principle of equality of all languages within Article 55 TEU and Article 1 Regulation No.1. This differentiation can however, be justified since equality seems to be accorded only in principle for practical reasons because strict adherence towards linguistic requirements would result in inefficiency, increased workload, increased translation costs and

¹⁰⁷ COM(2005) 596 final See I.1 MULTILINGUALISM AND EUROPEAN VALUES.

¹⁰⁸ Presidency Conclusions: Barcelona European Council 2002 See para. 44 or p.19.

¹⁰⁹ Presidency Conclusions: Barcelona European Council 2002 See para. 44 or p.19.

¹¹⁰ Urrutia & Lasagabaster, ‘Language Rights as a General Principle of Community Law’, 08 *German law Journal* 05 (2007), pp.480-481, available at http://www.germanlawjournal.com/pdfs/Vol08No05/PDF_Vol_08_No_05_479-500_Articles_Urrutia.pdf.pdf (last visited 13.04.2013)

¹¹¹ Regulation No.1 (OJ L 17, 6.10.1958, p. 385), Article 1:

‘The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese and Swedish’.

time.¹¹² The concept of equality being in principle and not in reality is also echoed within the Council Regulation on the Community trade mark (EC) No 40/94 within Article 115¹¹³. The five languages English, French, German, Italian and Spanish within Art.115 are still used even today, under the legal base of the Council Regulation (EC) No.207/2009, for appeals where applications are lodged in any of the official languages within the same Article. These five languages are the procedural languages of the Office for Harmonization in the Internal Market (OHMI) where the appeals to the Community trade mark, an EU agent, are lodged¹¹⁴.

Institutional bodies such as the European Parliament (EP) have the competence to create their own Rules of Procedure, acting by a majority of its members according to Article 232 TFEU. The EP seems to give high prestige to multilingualism within the Rules of Procedure of the European Parliament [7th parliamentary term - October 2012] as Rule 146(1) states: '*All documents of Parliament shall be drawn up in the official languages*' and Rule 146(2) states that: '*speeches shall be interpreted into other official languages or which the bureau considers necessary*'.¹¹⁵ The rationale behind the high prestige accorded to multilingualism is that the EP creates binding legislation on all Member States and EU citizens. Therefore it would be necessary to ensure there is transparency and accessibility of these legislative documents in order to safeguard participative democracy within the EU. Transparency is necessary to enable citizens of the Union or Member States to bring actions, within Article 263(4) TFEU or within Art. 263(2) TFEU, to the Court of Justice. It is essential that legislative acts are published in *official languages* of the Union to ensure that every citizen of a Member State or the Member States themselves can read and understand all legislative acts, transparency, which is the first step to enabling participative democracy thereafter where accountability measures might be initiated if a legislative act is unlawful. This same concept of respecting and ensuring multilingualism to enable transparency and accessibility is also echoed in the Council of the European Union where the procedural working language used in this institute is also all the 23 official languages of the EU.¹¹⁶

According to Article 24(4) TFEU all the other institutions such as the Council, The European Council, the Commission, the Court of Justice of the European Union, the European Central bank, The Court of Auditors and the Ombudsman shall hear and reply applications (accessibility) in the official languages mentioned in Article 55 TEU. This requirement is echoed by the Court of Justice of the European Union, in Article 29(1) of its Rules of Procedure (2010/c 177/01), when dealing with cases brought by citizens of the Member States. However, the procedural or working languages of the European Court of Justice are mostly French.¹¹⁷ In the Commission documents of correspondence are principally in all

¹¹² Els, 'Multilingualism in the European Union', *International Journal of Applied Linguistics* Vol.15 (3) (2005), pp. 263-281. See pp. 269- 271.

¹¹³ Council Regulation (EC) No 40/94 Article 115 :

'1. The application for a Community trade mark shall be filed in one of the official languages of the European Community.

2. The languages of the Office shall be English, French, German, Italian and Spanish.

3. The applicant must indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings.'

¹¹⁴ Europa (Community trade mark).See Office for Harmonization in the Internal Market (OHMI), available at <http://europa.eu/legislation_summaries/other/l26022a_en.htm> (last visited 13.04.2013).

¹¹⁵ EuroParl: Rules of Procedure of the European Parliament.

¹¹⁶ Gazzola, 'Managing Multilingualism in the European Union: Language Policy evaluation for the European Parliament', 5 *Language Policy for European Parliament* (2006), p.397, available at <http://www.euc.illinois.edu/includes/docs/managing_multilingualism_in_the_eu.pdf> (last visited 13.04.2013).

¹¹⁷ Curia See Court of Justice: Language arrangements and Gazzola, 5 *Language Policy for European Parliament* (2006), p.397. available at

official 23 languages but in reality responses to citizens or to Member States will usually only be translated into the same language used at application by the individual.¹¹⁸ The official and working language requirements of Council Regulation No.1 are also only applied in principle due to the fact that only legislation and policy documents of main public importance are translated into all official 23 languages within the Commission.¹¹⁹ These translations of the major important documents only account for a third of the Commissions' work in reality.¹²⁰ In the Council, although the staff and the officials have knowledge of at least two languages, multilingualism is also limited due to budgetary concerns, time constraints and other practical reasons. Because of this only the most widely known languages are used as working languages.¹²¹ In the European Central Bank in Frankfurt, English is used as procedural language both internally and externally.¹²² The derogating from the Treaty articles and Regulations, enforcing the linguistic diversity, by EU institutes and Agencies is unlawful in principle. Nonetheless the EU institutes act via *force majeure* due to the resultant limitations and inefficiency of implementing such measures. The lawful derogation from use of all official languages can be justified within Council Regulation No. 1 Article 6 but it is used for exceptional or 'specific' cases only and not for general application.

4. Sociolinguistic Aspects

One of the ways of achieving equality in the EU is through linguistic diversity which places paramount significance on every Member States' language. It is an important feature of the EU and is protected both in Article 55 TEU and the Article 22 of the European Charter of Fundamental Rights. The official documents of the EU are translated into the different languages used within the EU thus reflecting on the cultural diversity of the high authority accorded to every Member's own language. The *European Year of Languages [EYL]*, founded by the EU in 2001, project also aimed at achieving the goals within Article 22 of the European Charter of Fundamental Rights European Year.¹²³ Its activities had a budget of 10.792 million Euros given at the European Union level and also another 10 million Euros from the participating Member States.¹²⁴ The project was effective in raising awareness at national level of the need to value and recognize the importance of other languages within the Union. The EYL results also highlighted how other countries were aware and competent in using another language, which was English, but was seen as an insufficient step towards creating a multilingual European society.¹²⁵ Other projects such as *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006*¹²⁶ and *A New Framework Strategy for Multilingualism 2005* were implemented to increase language competences and

<http://www.euc.illinois.edu/includes/docs/managing_multilingualism_in_the_eu.pdf>(last visited 13.04.2013).

¹¹⁸ Europa, See: Translation and the European Union, available at <http://ec.europa.eu/dgs/translation/translating/index_en.htm> (last visited 13.04.2013).

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Consilium, See: Application of the language rules at the European Council and at the Council, available at <<http://www.consilium.europa.eu/contacts/languages-%281%29/application-of-the-language-rules-at-the-european-council-and-at-the-council?lang=en>> (last visited 13.04.2013).

¹²² Els, 'Multilingualism in the European Union', *International Journal of Applied Linguistics* Vol.15 (3) [2005] (p.263-281). See p. 269.

¹²³ Europa See Evaluation of the European Year of Languages 2001 – Executive Summary– August 2002 p.1.

¹²⁴ Europa See Evaluation of the European Year of Languages 2001 – Executive Summary– August 2002 p.2.

¹²⁵ Eur-lex See 11.3. Specific proposals for action: Multilingualism, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0597:EN:HTML>> (last visited 13.04.2013).

¹²⁶ COM (2005)596 final See I.2 What is multilingualism?

enhance multilingualism at national level. However, in the reports on the progress of the Action plan; the Comenius projects improved language skills but mainly for English.¹²⁷ This alludes to the disinterest of the EU citizens in becoming multilingual and having knowledge of other languages besides their mother tongue, with an exception in the case of English which is a globally known and used language within the business arena, media et cetera.

5. *Policy Analysis: Effectiveness and Cost*

Linguistic diversity helps to preserve the cultural integrity within the Union, equality, transparency and accessibility within the Union and is also a tool to ensure political prestige and importance of each Member State. The translations and the interpretations are carried out by the most competent professionals to ensure high accuracy of the translated documents within institutions such as the EP and the DG Interpretation within the Commission.¹²⁸ However, the scope of application of this linguistic diversity is limited as the translation into 23 official languages of all legislative acts, decisions, treaties according to Council regulation No.1 and Article 55 TEU is financially burdensome and leads to inefficiency of the EU institutions due to increased workloads. These workloads are evidenced by the need of the Commission internal DG interpretation to employ 300-400 freelance interpreters per day¹²⁹. The Commission only translates acts of grave importance to the public which account for only a third of their total work.¹³⁰ There is however, a decrease in the number of potential interpretations to be used in the future as figures currently show that when most of the interpreters reach retirement age it will be unlikely or difficult to find replacements especially if a large number take early retirement packages.¹³¹ This will reduce efficiency and increase delays due to staffing shortages or increase the budgetary costs for interpreters since there will be need of an increase in freelance interpreters.

In Article 314 TFEU the EP and Council acting in accordance with the ordinary legislative procedure shall draw up the Union's budget in accordance with the other elements within Article 314 TFEU. In 2006 the cost of translation in all EU institutions was estimated at €800 million and in 2005 the total cost of interpretation was almost €190 million.¹³² The multilingualism expenditure represents over one third of the total expenditure of Parliament.¹³³ In the Commission translation costs increased by only 20% since the Member States increased from 11 to 23 between the years 2004-2007.¹³⁴ The financial costs of these translations and language costs within the Union are estimated to be lower than 1% of the annual general

¹²⁷ COM(2007) 554 final/2 p.8

¹²⁸ EuroParl See European Parliament - the champion of multilingualism, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20071017FCS11816&format=XML&language=EN#title3> (last visited 13.04.2013).

¹²⁹ Europa See DG Interpretation in Key Figures, available at http://ec.europa.eu/dgs/scic/about-dg-interpretation/index_en.htm#anchor5 (last visited 13.04.2013).

¹³⁰ Europa See Selective Translation available at http://ec.europa.eu/dgs/translation/translating/index_en.htm (last visited 13.04.2013).

¹³¹ EUBusiness 'Interpretation in the EU – briefing' 19 February 2009, available at <http://www.eubusiness.com/topics/Languages/interpretation-eu-guide> (last visited 13.04.2013).

¹³² EuroParl (European Parliament - never lost in translation), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20071017FCS11816+0+DOC+XML+V0//en> (last visited 13.04.2013).

¹³³ EuroParl (European Parliament - never lost in translation), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20071017FCS11816+0+DOC+XML+V0//en> (last visited 13.04.2013).

¹³⁴ Europa See 2 - How much does DG Translation cost?, available at http://ec.europa.eu/dgs/translation/faq/index_en.htm#6 (last visited 13.04.2013).

budget of the EU.¹³⁵ The greatest cost within the EU institutes has to be the inefficiency caused by the time and resources consumed by language barriers due to an ever increasing workload which needs to be addressed by translators and interpreters especially in debates or oral proceedings and workload which necessitates 600 staff interpreters and 300-400 freelance interpreters per day.¹³⁶

The EYL project had a budget of over 20 million Euros from all Member States and the EU even though it was effective in raising awareness on the national level of the importance of multilingualism within the Union,¹³⁷ can such costs be justified only for the merits attained of national recognition of other languages and an increase of language teaching and learning which only resulted in the increase of communicative competences in the English language.¹³⁸ In the years 2000-2002, the *Socrates* and *Leonardo* programs invested more in programmes which promoted specific language learning by 66%. This increased their budget from 30 million to approximately 50 million Euros in the 2004-2006 period.¹³⁹ This led to an increase in for instance language projects by 84% and in adult education learning partnerships by 689%.¹⁴⁰ However, the results of these EU-funded language programs did not meet 'specific goals' of promoting linguistic diversity and multilingualism as in the Comenius in-service training of teachers which was mostly training in English and within the Comenius projects and grants mostly English was undertaken as a second language.¹⁴¹ The goals of promoting multilingualism, linguistic diversity and cultural diversity were not "really" achieved as *progress* cannot be established as a result of the promotion of one language, namely English. This brings to question whether the increased costs were justified by the outputs.

6. Political Aspects

One of the goals of maintaining linguistic diversity is to accord political prestige and significance to all the Member States. An example of politicized aspects of the linguistic diversity is within the patent rights in Europe. The Commission in 2000 proposed a *unitary Community patent* with English, French, and German as the procedural *working languages*.¹⁴² They had been used for the past thirty years and all the languages were both official languages of the EU and of the European Patent Organization (EPO).¹⁴³ The use of only the official languages of the EPO would not only be cost-effective, because of the reduction of translation costs of the patents from €14,000 to just €680 per patent, but would also lead to the reduction of patenting expenses incurred especially by small and medium sized enterprises which could

¹³⁵ Europa See 2 - How much does DG Translation cost?, available at <http://ec.europa.eu/dgs/translation/faq/index_en.htm#6> (last visited 13.04.2013).

¹³⁶ Europa See DG Interpretation in Key Figures, available at <http://ec.europa.eu/dgs/scic/about-dg-interpretation/index_en.htm#anchor5> (last visited 13.04.2013).

¹³⁷ Europa (Efficiency of the EYL).

http://ec.europa.eu/languages/documents/evaluation-execsum_en.pdf accessed on 13 April 2013.

¹³⁸ COM/2002/0597 final See 11.3. Specific proposals for action Multilingualism

¹³⁹ COM(2007) 554 final/2 p.5.

¹⁴⁰ COM(2007) 554 final/2 p.7.

¹⁴¹ *Ibid.*, p.8.

¹⁴² Locatelli, 'Balancing Diversity and Efficiency in the EU's Language Regime: E Pluribus Tres for the EU Patent?', 10 *Istituto Affari Internazionali* (August 2010), p.2, available at <<http://www.iai.it/pdf/DocIAI/iai1015.pdf>> (last visited 13.04.2013).

¹⁴³ Locatelli, 'Balancing Diversity and Efficiency in the EU's Language Regime: E Pluribus Tres for the EU Patent?', 10 *Istituto Affari Internazionali* (August 2010), p.4, available at <<http://www.iai.it/pdf/DocIAI/iai1015.pdf>> (last visited 13.04.2013).

be reinvested to aid growth.¹⁴⁴ This would also enable the EPO to carry out further research within the patenting area for the EU. This approach would be efficient since it was an already *tried and tested approach*. The Commission allowed other countries the possibility to apply for a patent in their own native language and receive the patent translated by the EPO in an official language.¹⁴⁵ Spain and Italy opposed the initiative as they wanted the same prestige awarded to German and the other official languages which are used by the majority of the other Member States.¹⁴⁶ Italy and Spain rejected the trilingual approach due to the need of political importance and prestige especially for Italy as Italian was one of the founding languages used in the EU amongst other founding Member States¹⁴⁷. This raises the question whether political importance and prestige should be awarded more status than efficiency. The proposal needed unanimity so therefore it was not adopted due to the veto of Spain and Italy.¹⁴⁸

The Commission, on 13 April 2011, adopted proposals for implementing regulations on the creation of unitary patent protection and a second one on the applicable translation arrangements.¹⁴⁹ This unitary patent protection system would also reduce the costs of patenting with working languages being defined within Article 14(3) of the Convention on the Grant of European Patents (EPC) and would also enable a compensation scheme within Art.5 of the Council Regulation on implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.¹⁵⁰ Italy and Spain were still threatening the use of their veto towards the trilingualism of the working languages as they considered the trilingualism contra to equality of Member States guaranteed in Article 22 of the European Charter of Fundamental Rights which is binding according to Article 6 TEU. However, the Council on 10 March 2011 decided to use enhanced cooperation within Article 118 TFEU in the creation of the unitary patent system in order to overcome the deadlock.¹⁵¹ The use of the legal base in Article 118 TFEU might however, be unlawful and therefore be in need of some amendments.¹⁵² This reflects on the inflexibility created by politics regarding the language regime of equality protected in Article 55 TEU and Council Regulation No.1. The unitary patent protection system would not only protect the small and medium-sized enterprises but would allow for an increase in research activities and innovation in order to expand the industry; these attributes are all positive and greatly outweigh the demerits. However, the initiative has been stalled for nearly 12 years due to political aspects of using a trilingualism approach and the need of political importance¹⁵³ and

¹⁴⁴ Europa, Patents: Commission proposes translation arrangements for the EU patent – Frequently Asked Questions, available at <http://europa.eu/rapid/press-release_MEMO-10-291_en.htm> (last visited 13.04.2013).

¹⁴⁵ Europa, Patents: Commission proposes translation arrangements for the EU patent – Frequently Asked Questions. See What is the aim of today's proposal?, available at <http://europa.eu/rapid/press-release_MEMO-10-291_en.htm> (last visited 13.04.2013).

¹⁴⁶ Euractiv: 25 countries give green light to European patent, available at <<http://www.euractiv.com/innovation-enterprise/25-countries-give-green-light-eu-news-503000>> (last visited 13.04.2013).

¹⁴⁷ Regulation No.1 (OJ L 17, 6.10.1958, p. 385).

¹⁴⁸ Blake Evans-Pritchard; *National pride stands in way of Community Patent*, euobserver, available at <<http://euobserver.com/news/4329>> (last visited 13.04.2013).

¹⁴⁹ Europa See Background, available at <http://europa.eu/rapid/press-release_MEMO-12-971_en.htm?locale=en>, (last visited 13.04.2013).

¹⁵⁰ COM(2011) 216 final.

¹⁵¹ COM(2011) 216 final See 1.1. History of the proposal.

¹⁵² Unitary-Patent, available at <<http://www.unitary-patent.eu/content/legal-basis-unitary-patent-do-not-play-fire>> (last visited 13.04.2013).

¹⁵³ EurActiv: EU seeks to break patent translation deadlock, available at <<http://www.euractiv.com/innovation-enterprise/eu-seeks-break-patent-translatio-news-495842>> (last visited 13.04.2013).

prestige for Italy and Spain who have since opted out¹⁵⁴. This illustrates how linguistic diversity can greatly undermine efficiency and raises the question whether *linguistic democracy* can truly be justified in such a context or, should a more realist approach be adopted but without also offsetting the already topsy-turvy political environment.

7. Possible Solutions

The use of all 23 official and working languages of the EU enshrined in Council Regulation No.1 is not always possible within the EU institutes due to a variety of limitations. In most of the institutions the procedural languages are reduced to either the most common languages, for example in the Council or English within the European Central Bank, to enable efficiency. Different approaches have been suggested by Michele Gazzola, specifically for the EP procedural language which can be used in this context, such as reduced multilingualism [only six official languages used].¹⁵⁵ However, this too could cause political conflict, as a result of which languages would be selected. Asymmetric systems where all official 23 languages would be used except in oral communications, or where the languages would be limited to two or three and finally controlled multilingualism where the different institutions could choose which languages would be a procedural language in both written and oral proceedings. This approach is likely to undermine transparency and equal accessibility of the EU institutions depending on which language is chosen. However, others have suggested the use of English as a *lingua franca* in the EU.¹⁵⁶

English is a universally known language and with the phenomenon of globalization the English language would seem the most viable and practical language to reduce language barriers within the Union. Various measures have been undertaken within the EU to promote language knowledge and learning. The use of projects such as the *EYL 2001* highlighted how English was used as an effective communication tool in other countries thereby supporting the views of English being a *lingua franca within Europe*¹⁵⁷. Another EU project was *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006* whose reports of the *Comenius projects* improved language skills, but mainly for English.¹⁵⁸ This further highlights the authoritativeness and the general competence of EU citizens to communicate in the English language. In both the language projects English was the most commonly selected and desired second language in most of the Member States. English is also commonly known and used in large groups of society and not only by elites due to other global influences such as music, films, the media¹⁵⁹ and even in formal settings such as in business and academia¹⁶⁰

¹⁵⁴Europarl, 'EU patent final act', *Newsletter - 2-5 July 2012 - Strasbourg plenary session*, available at <<http://www.europarl.europa.eu/news/en/pressroom/content/20120621NEW47396/4/html/EU-patent-final-act>> (last visited 13.04.2013).

¹⁵⁵ Gazzola, 'Managing Multilingualism in the European Union: Language Policy evaluation for the European Parliament', 5 *Language Policy for European Parliament* (2006), p. 402, available at <http://www.euc.illinois.edu/includes/docs/managing_multilingualism_in_the_eu.pdf> (last visited 12.04.2013).

¹⁵⁶ Els, 'Multilingualism in the European Union', *International Journal of Applied Linguistics Vol.15 (3)* [2005] pp. 263-281. See pp.266-269.

¹⁵⁷ Els, 'Multilingualism in the European Union', *International Journal of Applied Linguistics 3 Vol.15 (3)* [2005] pp. 263-281, See p. 269.

¹⁵⁸ COM(2007) 554 final/2 p. 8.

¹⁵⁹ Seidlhofer et al, 'English as a *Lingua Franca* in Europe', 26 *Annual Review of Applied Linguistics: Cambridge Journal* (2006) p.5.

¹⁶⁰ Mauranen, 'Features of English as a *lingua franca* in academia', 6 *Helsinki English Studies Vol. 6* 2010 pp.6-28 See p.6-7, available at <http://blogs.helsinki.fi/hes-eng/files/2010/12/Mauranen_HES_Vol6.pdf> (last accessed 13.04.2013).

.These global influences are present even within Europe due to the increasing globalization of the world. One of the potential drawbacks of using English as a *lingua franca* is dependent on the quality of English since it is a second language in most of the Member States where the language can be influenced by local customs and might form a type of “pidgin English” influenced by an endo-normative concept¹⁶¹. This could cause problems within the institutions with regard to communication and mutual understanding between employees from different countries but the role played by accents seems minor to development of mutual understanding.

It is to be expected that the role of English as a *lingua franca* of the EU would raise a lot of political conflicts especially in States with majorly used mother tongues such as German (16%), Italian and English (13% each), French (12%), then Spanish and Polish (8% each).¹⁶² Member State languages spoken in a somewhat international sphere such as German and French could lead to scepticism about promoting English due to expected resultant decrease of their own language spheres of influence.¹⁶³ English is still the most spoken foreign language since results from the *Eurobarometer 2005*¹⁶⁴ and the recent *Special Eurobarometer* (386)¹⁶⁵ where English ranked 38% in comparison to French (12%), German (11%), Spanish (7%) and Russian (5%). English is also the most widely spoken language at national level in 19 out of 25 Member states (excluding UK and Ireland) which proves that it is the true *lingua franca* of the EU and its use would be the most efficient within the EU.¹⁶⁶

8. Conclusion

The maintenance of linguistic diversity within Article 55 TEU and even Regulation No.1 is not reasonable and leads to problems of inefficiency within the Union if all 23 official languages are also the working procedural languages within the EU institutions and the EU. The EU institutions, such as the European Central bank and the Commission, do not use all 23 languages due to various efficiency issues. The issues can be solved by use of a *lingua franca* which currently seems to be English as evidenced by the results of language implementation projects such as the *EYL 2001* and *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004 – 2006*. The current globalisation also supports the use of English since it is a globally known language due to its use within the media, business, films and even academia. The linguistic diversity and also cultural integrity protected within the Union could be diminished but each Member State can preserve its own cultural and linguistic diversity at national level. The system used presently is unsustainable especially with the prospected enlargement of the Union soon to 28 Member States; even future enlargement would just result in larger problems therefore the Union needs to take action before things get worse out of hand since the likelihood of attaining successive interpreters to replace retirements within

¹⁶¹ Seidlhofer et al, ‘English as a Lingua Franca in Europe’, 26 Annual Review of Applied Linguistics : Cambridge Journal (2006) p.6.

¹⁶² Europa, available at: <http://europa.eu/rapid/press-release_IP-12-679_en.htm> (last visited 13.04.2013).

¹⁶³ Ammon, Language conflicts in the European, *International Journal of Applied Linguistics Union Vol. 16* (3) 2006 pp. 319-338. See p.323, available at <http://www.euc.illinois.edu/_includes/docs/language_conflicts_in_the_european_union.pdf> (last visited 13.04.2013).

¹⁶⁴ Europa: Eurobarometer p.4 Retrieved from: http://ec.europa.eu/public_opinion/archives/ebs/ebs_237_en.pdf accessed on 13 April 2013.

¹⁶⁵ Europa background, available at <http://europa.eu/rapid/press-release_IP-12-679_en.htm> (last visited 13.04.2013).

¹⁶⁶ Europa background ,available at <http://europa.eu/rapid/press-release_IP-12-679_en.htm> (last visited 13.04.2013).

the Union is unlikely. The change of the system towards linguistic diversity is not sustainable as evidenced by the institutions which have changed their procedural languages and ignored the general rule of 23 working and official languages in order to maintain efficiency even though this is in principle unlawful as it breaches Regulation No.1. Although derogation from the linguistic requirement is permissible under Regulation No.1 Article 6 it is only for exceptional or 'specific' cases.¹⁶⁷ The EU institutions are now undertaking unlawful actions and only adhering to the use of all 23 'official' languages as *working languages* in principle which highlights how necessary the revision of Article 55 TEU and other legislation stipulating the need for multilingualism has become in order to ensure not only efficiency but also as a way to limit the unlawfulness carried out by the institutions as a *force majeure*. The EU needs to take some action whether it is having a *lingua franca* for the EU or finding a compromise between EU institutions duties, towards promoting cultural and linguistic diversity, and efficiency since the complete withdrawal from the multilingualism within the Union seems unlikely. This is evidenced by all the investment within this area such as language implementation projects and the inclusion of a portfolio of Commissioner for Multilingualism, Leonard Orban, within the Union¹⁶⁸. However, it seems necessary for Member States to let go of their nationalistic ego underlying the demand of maintaining their own languages within the Union and work together towards reducing costs and finding the most effective means of creating a functional and *well-oiled EU machine* which is both sustainable and transparent.

¹⁶⁷ Regulation No. 1 (OJ L 17, 6.10.1958, p. 385), Article 6.

¹⁶⁸ Europa, available at <http://ec.europa.eu/archives/commission_2004-2009/index_en.htm> (last visited 13.04.2013). Although Leonard Orban's term ended in 2009 this position has been undertaken in the 2010-2014 Barosso Commissioners by Androulla Vassiliou.

INTRODUCING DISSENTING AND CONCURRING OPINIONS AT THE COURT OF JUSTICE: IMPROVING THE READABILITY OF JUDGMENTS OR CREATING MAYHEM?

Egelyn Braun

1. Introduction

The Court of Justice delivers collegiate rulings that excludes the possibility of concurring and dissenting opinions as derived from Art. 27 of the Rules of Procedure of the Court of Justice. A dissenting opinion is expressed by a judge who does not agree with the majority decision, while a concurring opinion is one where the judge agrees with the main judgment but might provide a different line of reasoning.¹ In light of recent criticism concerning the democratic deficit in the Union's decision-making, it would appear to be a progressive step to start considering the possibility of adopting measures that are not only used in numerous Member States and international organizations such as the European Court of Human Rights, but that could also improve the readability and accessibility of judgments, and contribute to a more multifaceted development of European law as a whole.

In order to assess the reasoning behind the Court's present approach and the possibility of future reforms on the matter, we will briefly consider the historical, political and procedural elements of individual opinions in the Court of Justice. By dissecting the main arguments supporting collegiate rulings, it will become more apparent whether the individual opinions could reach more desirable results for the Court. The theoretical aspect of individual opinions will be assessed by presenting the advantages and disadvantages in relation to readability - in particular, the effects on the style of judgments, translations and transparency. The practical aspect will be considered by drawing a comparison between the position of the Advocates-General to that of a dissenting or concurring judge. By thoroughly assessing the numerous implications of individual opinions in the Court of Justice, we will arrive at the conclusion that the benefits outweigh the disadvantages of introducing the practice.

2. Historical Elements: Individual Opinions – a New Concept for the Union?

The founding members of the European Union - France, Germany, Italy, Belgium, the Netherlands and Luxembourg - are all civil law countries that were relatively unfamiliar with the concept of dissenting and concurring opinions, especially during the time of the establishment of the Court of Justice in 1952.² Much has changed since then, including the introduction of common law elements such as *de facto* case law based on precedents in the Court, and the introduction of dissent in higher courts in several Member States. Countries such as the United Kingdom, Germany, Estonia, Greece, Italy and several Scandinavian states, recognize dissenting opinions in some form on the level of the highest courts or constitutional courts.³

The lack of individual opinion also relates strongly to the secrecy of deliberations, which is also the core principle of the judges' oath, as stipulated in Art. 2 of the Statute of the Court of

¹ B. Garner, *Black's Law Dictionary*, 8th edition, West Group (2004).

² J. Laffranque, Dissenting Opinion in the European Court of Justice – Estonia's Possible Contribution to the Democratisation of the European Union Judicial System, IX *Juridica International* (2004), p. 16.

³ J. Laffranque, Dissenting Opinion and Judicial Independence, VIII *Juridica International* (2003), p. 165.

Justice of the European Union. Judges are bound to “perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court”. By allowing dissenting and concurring opinions, the veil of secrecy may be lifted by allowing various arguments that were used to arrive at the final judgment to be assessed in opinions.

From a historical perspective, the Roman legal tradition initially included public deliberations and declarations of the judgment. It was not until much later, with influence from the canonist procedures, that secrecy became prominent.⁴ In France, the earliest degree for secrecy was published in 1344 and over the course of the next four centuries, this rule developed into a protection mechanism for the judges. After the French Revolution, the principle of secrecy was abandoned largely due to the general distrust for the courts. However, soon thereafter, deliberations were once again made secret, although the process has not always been without protest, especially in criminal cases.⁵ With influence from the Napoleonic codes, the Netherlands, Belgium and Italy also adopted the principle of secrecy.

These juriscultural developments shed light on the current situation in most of these states (with the exception of Italy that has since changed its perspective), and explain the Union’s current approach in relation to the strong influence of the French legal tradition, especially with the Court’s structural model, the Conseil d’Etat.⁶ However, with the vast expansion of the Union and the development of dissenting opinions in most Member States, the concept of introducing dissenting and concurring opinions no longer seems like an unconventional proposal.

3. *Political Elements: Maintaining Authority for the New Legal Order?*

One of the principal reasons for delivering collegiate rulings is to maintain judicial authority and produce an uniform interpretation and application of EU law as stipulated in Art. 19 TEU. By introducing individual opinions, especially those of dissenting nature, the authority of the Court and legal certainty may very well be undermined. Moreover, it may be more difficult to establish the main principles of the ruling with well-researched and well-reasoned dissenting opinions by its side.⁷ However, a healthy amount of debate between opposing views could provide the Court with a valuable aspect of self-criticism, thus allowing EU law to develop and produce more desirable outcomes for all parties involved.⁸ The benefits of allowing dissent could extend far beyond addressing the arguments of the main judgment – individual opinions could help place the judicial questions in a wider legal context, introduce elements of comparative European law from various Member States and make the legal reasoning more accessible for a wider range of audience.⁹ As a result, the Court would reach a state of compromise that would both maintain the authority of the main judgment, but also satisfy the holders of opposing views by assessing the legal arguments in question in a more multifaceted range and form. After all, the Court does not have problems with asserting authority like some of the other international courts do - their decisions are ultimately binding in all of the Member States.

⁴ K. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, Vol. 8 *American Journal of Comparative Law*, (1959), p. 415.

⁵ K. Nadelmann, Vol. 8 *American Journal of Comparative Law* (1959) p. 422.

⁶ J. Laffranque, IX *Juridica International* (2004), p. 17.

⁷ J. Laffranque, IX *Juridica International* (2004), p. 21.

⁸ F. Jacobs, *Advocates General and Judges in the European Court of Justice: Some Personal Reflections*, Kluwer Law International (2000), p. 24.

⁹ F. Jacobs, *Kluwer Law International* (2000), p. 26.

4. *Procedural Elements: Protecting the Independence of Judges?*

One of the main arguments supporting the single ruling practice includes the preservation of judicial independence. Once the appearance of unanimity breaks down, the position of the judges changes radically. The question of independence relates closely to the appointment and re-appointment procedure stipulated in Art. 253 TFEU, Art. 255 TFEU and the Statute of the Court of Justice of the European Union. Judges will be appointed by the common accord of the governments of the Member States for a six-year term, which is renewable for an unlimited amount of times.

The problematic aspect of possible re-appointments relates to the judges' dependence on the Member States that are appointing them. With the introduction of dissenting and concurring opinions, the Court could end up on a slippery slope, which allows the judges to show partiality through the individual opinions in order to support the views of the Member States and thus ensure their re-appointment.¹⁰ On the flip side, the judges could also jeopardize their position by not supporting the views of the Member States through their individual opinions. Political pressure can lead both sides to retaliation, but for esteemed judges that have been elected by the Member States because of their outstanding careers, national governments are simply not the only audience they consider.¹¹ Although the endangerment of the independence of the judges is clearly a possibility, it cannot be seen as a solid argument to negate their chance of presenting an individual opinion altogether. By introducing individual opinions, the preservation of judicial independence would depend more on the reasoned choices of a particular judge and the actions of the Member States, not the safeguards of the Court's procedural elements.¹² By relying on the premise that it is in the best interests of both the Member States and the Court to provide an impartial and democratic judicial process, the introduction of individual opinions could lead to a more desirable outcome for judicial independence, not create mayhem in that regard. Moreover, in relation to the oath as stipulated in Art. 2 of the Statute of the Court of Justice of the European Union, judges are obliged to 'perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court'. The importance of the secrecy of deliberations was previously noted, but the first two elements must equally be considered in relation to judicial independence. In order to act impartially and conscientiously, a judge that holds a minority view would act in contradiction if he were to be denied the opportunity to express a dissenting opinion.¹³ Individual opinion would ensure mental independence and that the views of every judge are respected, which could be seen as reinforcing collegiality instead of undermining it.¹⁴

5. *Individual Opinion in Theory: Advantages and Disadvantages for Readability*

¹⁰ J. Laffranque, IX *Juridica International* (2004), p. 17.

¹¹ V. Perju, Reason and Authority in the European Court of Justice, 49 *Virginia Journal of International Law* 2 (2009), p. 349.

¹² F. Jacobs, *Kluwer Law International* (2000), p. 25.

¹³ J. Laffranque, VIII *Juridica International* (2003), p. 164.

¹⁴ J. Alder, Dissents in Courts of Last Resort: Tragic Choices?, Vol. 20 *Oxford Journal of Legal Studies* 2 (2000), p. 240.

In order to provide a theoretical comparison of the advantages and disadvantages of introducing dissenting and concurring opinions, we will consider its multifaceted effects on the style of judgments, translations and transparency.

5.1 Style: Shift from Generality to Specificity

It could be said that the style of reasoning in the Court's judgments is more focused on the outcome than the process.¹⁵ The level of generality that is used when describing a principle, precedent case or interpretation of a statutory provision, is highly influential for the outcome of the case – it can limit the scope of the decision and give the judges a better chance to match the facts of the case with the principle at hand.¹⁶ Consequently, the Court's justificatory style has often been criticized as being vague and overly abstract.¹⁷ With the introduction of dissenting and concurring opinions, there could be a shift from generality to specificity in relation to assessing the legal principles used in its reasoning. This could be seen as an advantage for legal scholars and national courts, who would be able to benefit from the increased accessibility and readability of the judgments. For the Court, this could be seen as a disadvantage if the generality of their statements is dissected by the specificity of the dissent. Moreover, if the main judgment contains inconsistent or poor legal reasoning with little precedent, then dissenting opinions could only make it more difficult to establish the main principle of the judgment. It is a clear possibility that a well-reasoned dissent could overshadow or undermine the main judgment in controversial cases, but simultaneously, it could also be seen as a good incentive to improve the quality of judgments in order prevent this situation from occurring.¹⁸ When taking into account that the Court's general approach aims to fulfill goals of uniformity and effectiveness, then the increased scope of legal interpretation through individual opinion could be fundamentally at odds with the prevailing practice.

5.2 Translation: Increasing Costs, Time Consumption and Workload

While the availability of judgments in the official languages of the Union can certainly be seen as a advantage for readability and accessibility, it also serves as a large disadvantage in terms of the Court's workload and efficiency. Firstly, all of the Courts documents are translated into its internal working language of French.¹⁹ Secondly, the judgments are translated into the respective official languages, as stipulated in Art. 29-31 of the Rules of Procedure of the Court of Justice. The obligation to translate dissenting and concurring opinions would certainly increase the workload of the Court, the costs of translation and time consumption.²⁰ However, the accessibility of case law for all of the Member States is a factor of utmost importance for the Court's legitimacy, and adjustments to handle the increasing workload would have to be made.

5.3 Transparency: Opening the Line of Legal Reasoning

¹⁵ G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (Cambridge University Press, Cambridge 2012), p. 26.

¹⁶ G. Conway, Levels of Generality in the Legal Reasoning of the European Court of Justice, Vol 14. *European Law Journal* No. 6 (2008), p. 778.

¹⁷ V. Perju, 49 *Virginia Journal of International law* 2 (2009), p. 310.

¹⁸ G. Conway, Vol 14. *European Law Journal* No. 6 (2008), p. 245.

¹⁹ House of Lords European Union Committee, *The workload of the Court of Justice of the European Union*, 14th report of session 2010-11, para. 11.

²⁰ House of Lords European Union Committee, 14th report of session 2010-11, para. 12.

By unveiling the secrecy of deliberations through individual opinion, the Court's line of legal reasoning would be explained in more depth. Providing a new perspective on the reasoning that led to the majority decision via concurring opinions could help fill the gaps in law and give a better understanding of the principles established.²¹ A dissenting opinion would lead to a more challenging perspective that ensures a healthy debate and a wider context for the principles assessed. As a disadvantage, the Court's authority and legal certainty may be undermined, and it may be more difficult to establish the main principles of the ruling with well-researched and well-reasoned individual opinions by its side.²² However, in relation to readability, the arguments for individual opinion tend to outweigh the counterarguments by virtue of transparency. It might often be the case that the reasons for a certain judgment could be better understood in light of a contrary view.²³ Moreover, especially in controversial cases, the lack of transparency could prove to be counterproductive because it has the potential to lead to the generation of suspicion among the public.²⁴ The current style of judgments does not always provide sufficient information to build counterarguments for dissenting opinions, which consequently puts more pressure on the holders of opposing views to thoroughly describe the line of reasoning.²⁵ As a result, the Court would be left with a larger body of well-reasoned legal arguments that could help develop the Union's legal policy as a whole and even serve as a basis for future drafts and papers on the subject matter.

6. *Individual Opinion in Practice: the Position of the Advocates-General*

When discussing the introduction of dissenting and concurring opinions, we should note that several elements of the practice are already represented in the unique body of the Advocate-General. Art. 252 TFEU stipulates that the Court will be assisted by eight Advocates-General, whose duty is to 'act with complete impartiality and independence to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement'. The appointment procedure and requirements for Advocates-General are identical to the procedure for judges, as stipulated in Art. 253 TFEU and the Statute of the Court of Justice. Judges and Advocates-General rank equally in precedence according to their seniority in office, as stipulated in Art. 6 of the Rules of Procedure of the Court of Justice. From the outset, it appears that the Advocate-General can be seen as a member of the Court that offers a unique perspective much like the dissenting and concurring opinions of a judge would. In order to determine whether this body could serve as an alternative to the individual opinion of judges and whether it would still be needed after the introduction of the practice, we will draw a comparison of the position of the Advocate-General to that of a dissenting or concurring judge.

6.1 Effect on the Judgment: Essential or Supplementary?

The dissenting or concurring opinion of a judge will be published after the main judgment has been made. It is especially important for dissenting opinions that the arguments of the

²¹ J. Laffranque, IX *Juridica International* (2004), p. 21.

²² J. Laffranque, IX *Juridica International* (2004), p. 17.

²³ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge University Press, Cambridge 1982), p. 2.

²⁴ J. Alder, 20 *Oxford Journal of Legal Studies* 2 (2000), p. 243.

²⁵ J. Laffranque, IX *Juridica International* (2004), p. 17.

majority decision are established so that counterarguments could be crafted in response. Individual opinions do not directly affect the judgment but merely serve as a form of supplement. However, the practical effects of a powerful dissenting opinion could extend beyond its initial position – after all, the dissent of today could be the majority of tomorrow. In several civil law Member States, the scope of application is often limited to important cases in the highest court or constitutional court. In comparison, the opinion of the Advocate-General is presented during a much earlier phase, as its principal purpose is to assist before the deliberation process. As proof of their influence, the opinions of Advocates-General are also often cited in the final judgments.²⁶ The submissions of the Advocate-General will be heard during the oral procedure, although the Court may decide, after hearing the Advocate-General, that the case shall be determined without the submission, as stipulated in Art. 20 (5) of the Statute of the Court of Justice. To conclude, both opinions are subject to limitations, but the actual effect on the judgment varies greatly – individual opinions have no effect, whereas the opinion of the Advocates-General can be directly applicable.

6.2 Nature of the Opinion: a Duty or a Right?

One of the fundamental differences of the individual opinion of a judge and the opinion of Advocates-General resides in the nature of their prerogative. The ability to present a dissenting or concurring opinion can be seen as a right, whereas the submission of an opinion of Advocates-General is an obligation derived directly from their duty as a legal body.²⁷ It is important to note this difference when considering whether the Advocates-General opinion could be seen as an alternative to individual opinion. If we rely on the premise that the ability to present a dissenting opinion is a fundamental right relating to the independence of the judge, then the duty to provide an advisory submission undoubtedly falls short of that concept.

6.3 Substance of the Opinion: Similar Scope but Different Angle

The opinion of Advocates-General is usually crafted in a manner similar to that of the final judgment – it contains the facts of the case, the state of law, the issues at hand, the submissions of the parties involved and the reasoned opinion on the outcome of the case.²⁸ It usually offers a more in-depth approach than the final judgment itself and lays out the issues that the Court should or should not address in their deliberations.²⁹ Likewise, the dissenting or concurring opinion of a judge could provide a more in-depth analysis of the case and the principles at hand. The main difference between the two is derived from the fact that the Advocates-General does not see the judgment at the time of his submission, whereas the individual opinions rely directly on the final judgment. It is a crucial difference that determines not only the substance of the opinion but the entire approach that is taken.

6.4 Duality of Opinions: Co-exist or Overlap?

Based on the differences and similarities considered above, we must decide whether the two functions overlap in their purpose or whether they each provide equally important perspectives that can coexist in the Court's practice. Although the Advocates-General and judges enjoy a similar position along with similar appointment procedures, they cannot be

²⁶ F. Jacobs, *Kluwer Law International* (2000), p. 21.

²⁷ J. Laffranque, *IX Juridica International* (2004), p. 18.

²⁸ F. Jacobs, *Kluwer Law International* (2000), p. 18.

²⁹ F. Jacobs, *Kluwer Law International* (2000), p. 19.

viewed as identical. In addition, the nature of their opinions is fundamentally different, for a right is not the same as a duty. Moreover, the opinions are presented in a different phase of the proceedings and possess a different function in terms of the effect on the judgment, as well as the reliance or non-reliance on the final judgment. We can therefore conclude that although the Advocates-General provide a unique perspective that can differ from the judgment much like individual opinions, they do not overlap with the concept in any fundamental form due to procedural and substantive differences.³⁰ In my view, coexistence of both opinions is therefore not only possible, but also complimentary for the development of EU law.

7. Conclusion

To conclude, the practice of dissenting and concurring opinions is used in numerous Member States on the highest court level, as well as in several international organizations such as the European Court of Human Rights. We considered the historical, political and procedural elements to explain why the Court of Justice is reluctant to introduce the practice in light of its increasing popularity. The leading arguments against individual opinion relate to the protection of the independence of the judges, the maintenance of authority and uniformity, and the historical allegiance to hard-core civil law countries such as France. By analyzing the theoretical aspect of individual opinion, we concluded that the style of judgments could greatly benefit from the increased readability, and the level of transparency for the line of reasoning would help contribute to a more multifaceted development of European law as a whole. The downside of introducing individual opinion would naturally relate to the increase in workload, time consumption and costs, especially due to the obligation of translation. However, the accessibility of case law for all of the Member States is a factor of utmost importance for the Court's legitimacy, and adjustments to handle the increasing workload would have to be made.

By analyzing the practical aspect of individual opinion, we concluded that the position of the Advocate-General is ultimately not able to replace the individual opinion of a judge. The differences in the nature and substance of the opinion, as well as in the effect on the judgment render the two practices separate. However, in my view, both opinions could coexist since they do not fundamentally overlap in substantive or procedural form. By thoroughly assessing the numerous implications of individual opinions in the Court of Justice, we have arrived at the conclusion that the benefits outweigh the disadvantages of introducing the practice. The ability to justify ones line of reasoning will add to the recognition of legal responsibility and serve as a great tool to maximize the efforts of the Court. In order to balance the disadvantages, individual opinion could be limited to certain cases or areas, and the loss in authority could be compensated by the gain in legitimacy. The very basis of democracy relies on debate that allows opposing views to be presented, and needless to say, it is especially important to preserve these values in the highest court of the European Union. With the current realities of political dialogue suggesting that we need more measures to further the democratization of the Union's institutions, it would seem appropriate to start considering the introduction of dissenting and concurring opinions in the European Court of Justice.

³⁰ J. Laffranque, *IX Juridica International* (2004), p. 19.



Amsterdam



Maastricht



This book contains selected papers that were first presented at a Student Conference on 9 December 2010. This conference was convened in the context of the course “EU Law Foundations – The Institutional Functioning of the European Union”, which is part of the Bachelor Programme European Law School offered by the Faculty of Law at Maastricht University. The organization of this conference and the production of this book were made possible by financial support offered by the Education, Audiovisual and Culture Executive Agency (EACEA). The papers contained in the book touch upon a variety of topics dealing with EU institutional law, contributing to a better understanding of the legal and political functioning of the European Union and its institutions.